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Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF SANTA ANA,
Cross-Petitioner,
vs.
JESSE J. SANCHEZ,
Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a City's police officer has a property interest in merit pay, i.e., pay awarded for meritorious performance?

II. Assuming a property interest existed, can the City's employees' property interest in merit pay be divested pursuant to an amendment of the City Charter affirmatively voted upon by a majority of the electorate of the City?

III. Assuming a property interest in merit pay, was an appeal regarding its removal to the initial decisionmaker (Captain Hansen and/or the Chief of Police) constitutionally sufficient?

IV. Whether a plaintiff on summary judgment can establish liability against a municipality under 42 U.S.C. § 1983 without establishing that a City policy-maker deprived the plaintiff of due process?

V. Whether the mere removal of merit pay in the amount of $950 over a six month period ($159 per month) can constitute a constructive discharge?

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OFFICIAL REPORT OF OPINION

The opinion below appears as follows in the official reports of the United States Court of Appeals: Sanchez v. City of Santa Ana, 915 F.2d 424 (9th Cir. 1990). [Appendix D]

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 and the Rules of the United States Supreme Court, Rule 10.1(a) and (c) to consider this Cross-Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit. The United States Court of Appeals for the Ninth Circuit Opinion was filed September 25, 1990. A timely petition for rehearing to the Ninth Circuit was denied on February 22, 1991. A Petition for Writ of Certiorari was received by cross-petitioner on May 24,

1991 and, therefore, cross-petitioner relies upon Rule 12.3 of the Rules of the United States Supreme Court for the timely filing of this cross-petition.

STATUTORY PROVISIONS, CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED IN THIS CASE

This case involves the requirements for procedural due process under the 14th Amendment to the United States Constitution and the elements of 42 U.S.C. § 1983, referred to throughout. Also relevant are Santa Ana City Charter § 1008 [Appendices Q and R] and Santa Ana City Council Resolution No. 58-281, as amended by City Council Resolution 68-123 [Appendix P].

STATEMENT OF THE CASE

This Cross-Petition relates only to the district court's entry of summary judgment as to cross-respondent Sanchez's

claim that the City of Santa Ana deprived him of due process of law when it removed his discretionary merit pay in March-April 1979. Jurisdiction of this claim before the District Court was based upon 42 U.S.C. § 1983 and 28 U.S.C. § 1343.[1/]

At all times relevant to this lawsuit, employees' salaries at the City of Santa Ana were determined by job classification and set pay steps within the particular job classification.

1/ The original parties to this action were: (1) plaintiffs Jesse J. Sanchez, Victor Torres and Robert Caro, and (2) defendants City of Santa Ana, City of Santa Ana Police Department, Police Chief Raymond C. Davis, Personnel Director Donald Bott, Captain E.B. Hansen, Captain Robert Stebbins, Lieutenant Oliver Lee Drummond, Lieutenant Michael Lewellen, Lieutenant Dale Sterzer, Lieutenant Norwood Williams, Lieutenant Lawrence Pitzer, Sergeant Gary Dixon, Sergeant William Bruns, Sergeant John Collins, Sergeant Richard Faust, Sergeant James McDaniels, Sergeant Michael Lanners, and Sergeant John Dittus. The claims of Torres and Caro against all defendants, as well as Sanchez's claims against all defendants except for the City of Santa Ana, were dismissed by the District Court and are the subject of the companion appeal attached as Appendix O to the City's Brief in Opposition to Petition for Writ of Certiorari.

Within each pay classification, there were five steps, "A-E." Step "A" was the entry level pay step for each new probationary employee for the first six months; Step "B" was the automatic increase after six months of employment; Step "C" was the automatic increase to base level pay for an employee within a classification for one year or more; and Steps "D" and "E" were discretionary merit level pay steps which were awarded based upon meritorious performance above the ordinary call of duty, and were not automatic pay increases based on a period of employment, like Steps "A-C." [ER 714]

Merit pay for employees of the City of Santa Ana, during the relevant time period, was created pursuant to Santa Ana City Council Resolution No. 58-281, as amended by City Council Resolution No. 68-123. [Appendix P; ER 711-22] At the

time Sanchez received his merit pay steps "D" and "E," the available appeal upon removal of merit pay, as set forth in Santa Ana City Charter § 1008 ("old Section 1008"), was a Personnel Board hearing. [Appendix Q; ER 907-08]

Cross-respondent Sanchez ("Sanchez") was hired by the Santa Ana Police Department (the "Department") in September 1975. In June 1978, two months after Sanchez had been granted merit pay Step "E," the citizens of Santa Ana voted on and passed by majority vote an amendment to the Santa Ana City Charter. That amendment, inter alia, amended City Charter Section 1008 by eliminating appeals of merit pay removal from its purview ("new Section 1008"). [Appendix R; ER 1215-16]

On February 28, 1979, Sanchez's supervisors completed his performance evaluation and concluded that Sanchez was

not performing at a level warranting merit pay. [ER 701-03] The uncontradicted evidence shows that Sanchez's merit pay Step "E" was removed based upon the recommendation made by Sanchez's immediate supervisors (Sergeant Collins and Lieutenant Williams) in his February 1989 employee performance evaluation. [CR 128; ER 701-03] This change resulted in a total loss in pay of approximately $470 over a six month period. [CR 128]

In March 1979, Captain Hansen had received two separate disciplinary suspension recommendations on Sanchez for twenty and thirty days, respectively, which would have resulted in a loss of pay equal to $4,000-5,000. However, Hansen decided not to impose any discipline. [CR 128; RT 8640:20-24] Instead, Hansen recommended removal of Sanchez's remaining merit pay step,

returning Sanchez to his base salary level. [CR 128, 155] The removal of that step, merit pay Step "D," resulted in a total loss in pay of approximately $470 over a six month period, one-tenth of the loss that Sanchez would have incurred if Hansen had imposed the recommended discipline. [CR 128; RT 8634:10-8641:6] Furthermore, both merit pay Steps "D" and "E" were subject to review and reinstatement in six months, provided that Sanchez's performance improved. [CR 155; RT 8640:17-20]

The removal of Sanchez's merit pay steps in March 1979, was performed in accordance with the rules and regulations governing all Santa Ana City employees as they existed after the voter-passed amendment to the City Charter in 1978. Under these rules, Sanchez had the right to appeal Hansen's decision to remove his merit pay steps through the City's

grievance procedure.[2/] In order to pursue the grievance procedure, Sanchez requested from Hansen and Captain Stebbins a "Statement of the Charges" upon which the removal of his merit pay steps were based. [CR 155; ER 704-07; Ex 243] In response to Sanchez's request, Hansen advised Sanchez in writing that his merit pay steps were removed based upon his employee evaluation and his substandard performance evidenced by the

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2/ The Ninth Circuit's Opinion misstates the City's grievance procedure as being City Charter Section 1008 and a Personnel Board hearing. [Appendix D.7] Rather, Section 1008 was a specifically limited appeal process [Appendices Q and R], and the evidence at trial was unequivocal and uncontradicted that the City's grievance procedure (which applied herein) was an administrative appeal up to the City Manager, who had final authority [RT 2950:19-295:16, 2982:25-2984:2, 2944:2-13 (Testimony of Police Chief Davis); 7284:21-7285:9 (Testimony of former City Personnel Director Donald Bott); 5594:4-5595:6 (Testimony of Police Personnel Lieutenant C.W. Jordan); 8623:3-8624:8 (Testimony of Police Captain E.B. Hansen)]. All of this testimony was presented to the Ninth Circuit in Cross-Petitioner's (then Appellant) Opening Brief on appeal. [Appendix S].

pending disciplinary actions. [CR 155; ER 708-10; Exs 244, 247] Hansen further advised Sanchez that to appeal Hansen's decision, Sanchez's "next step" was to submit a written grievance to the Chief of Police, Raymond C. Davis, and arrange for a personal interview with Chief Davis. [CR 155; ER 708-10; Exs 244, 247]

The grievance procedure provided for review up through the City Manager, and the City Manager was the final authority for any unresolved grievance. [CR 155; RT 2950:19-2951:16; 2944:2-13; 7284:21-7285:9; 5594:4-5595:6; 8623:3-8624:8; Appendix S] However, Sanchez failed or refused to pursue the grievance procedure even to the next step -- a grievance meeting with the Chief of Police. Instead, he went out on sick leave and then refused to return to work -- even after his medical release -- unless both

of his merit pay steps were restored. [RT 9195:10-14; 9207:1-5; Ex 55:162]

The Department refused Sanchez's unwarranted request, and he never returned to work. Instead, Sanchez filed this lawsuit claiming, inter alia, (1) that the Department's removal of his discretionary merit pay steps without complying with old Section 1008 violated his due process rights (based upon a claimed property right which he argued could not be divested by a voter-passed amendment to the City Charter), and (2) that this alleged removal of merit pay without due process, resulting in a total pay loss of approximately $950 over a six month period, constituted Sanchez's constructive discharge from employment with the Department.

On June 3, 1983, the district court granted partial summary judgment in favor of Sanchez and against the City and Chief

Davis, on the grounds that the City had somehow violated Sanchez's due process rights in removing his merit pay steps in March-April, 1979. [ER 362-67]

After hearing 39 days of trial presentation by Sanchez and his co-plaintiffs on their discrimination/ retaliation/obstruction of justice claims, the district court directed a verdict in favor of the City and all of the other defendants and against all plaintiffs on all remaining claims. [ER 421] On motion of the City and Chief Davis to reconsider the earlier partial summary judgment on Sanchez's due process claim, the district court reversed its judgment as to Chief Davis, but not as to the City. [ER 423] Neither in his Motion for Partial Summary Judgment, nor in his Opposition to the Motion to Reconsider the Partial Summary Judgment, did Sanchez establish (or even allege)

that the City's official policymakers were responsible for depriving him of due process, an essential element of a Section 1983 claim against a city. [ER 1201-11; CR 127, 590]

Thereafter, the damages phase of trial was held regarding Sanchez's due process claim before the same jury. Despite the City's repeated requests to do so, the district court refused to instruct the jury that the court had directed a verdict in favor of all defendants on all claims of discrimination, retaliation and obstruction of justice. [ER 423; RT 9073:10-23; 9077:3-24] At the end of the damages phase of trial, the jury found that the mere removal of Sanchez's merit pay -- a single alleged due process violation which resulted in a total pay loss of approximately $950 over a six month period -- had constituted a constructive

discharge and caused him severe emotional distress. The jury then awarded Sanchez $400,000 in lost wages, present and future, and $500,000 on his emotional distress claim. [RT 9585:4-9586:11] The City appealed the district court's ruling and jury verdict.

On appeal to the United States Court of Appeals for the Ninth Circuit, the court determined, inter alia, that Sanchez "had a vested property right to merit pay at the time he began receiving merit pay under old Section 1008" and that "the City could not arbitrarily take away Sanchez's right to continued receipt of merit pay simply by amending Section 1008." [Appendix D.9-11 (emphasis added)] Further, the court found that Sanchez was not provided with a constitutionally sufficient appeal of the decision to remove his merit pay [Appendix D.11-12], and that the mere

removal of Sanchez's merit pay was sufficient to constitute a constructive discharge under Section 1983 [Appendix D.14-15]. The Ninth Circuit refused to consider the City's argument that Sanchez had failed to establish that the City's policymakers deprived him of due process, which should have precluded a judgment against the City under 42 U.S.C. § 1983.

On February 22, 1991, the Ninth Circuit denied cross-respondent's Petition for Rehearing. [Appendix E] On May 23, 1991, cross-respondent filed his Petition for Writ of Certiorari with this Court.

ARGUMENT

I.

WHETHER THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE NINTH CIRCUIT, CONTRARY TO DECISIONS IN THIS COURT AND IN OTHER CIRCUITS, CONCLUDED THAT A CITY POLICE OFFICER HAS A PROPERTY INTEREST IN DISCRETIONARY MERIT PAY, I.E., PAY AWARDED ONLY FOR MERITORIOUS PERFORMANCE

Cross-petitioner City is seeking this writ of certiorari under Supreme Court Rules 10.1(a) and (c). This petition presents questions of substantial importance concerning the relationship between Fourteenth Amendment protections and a municipal employee's continued receipt of merit pay, i.e., pay awarded for meritorious performance.

A. THE NINTH CIRCUIT DETERMINED THAT SANCHEZ'S PROPERTY INTEREST IN MERIT PAY WAS BASED ON OLD SECTION 1008, DESPITE THE FACT THAT MERIT PAY WAS NOT CREATED UNTIL SIX YEARS LATER IN RESOLUTION 58-281

At an election held November 4, 1952, the citizens of the City of Santa

Ana approved the adoption of the City Charter, which contained Charter Section 1008 ("old Section 1008"). Merit pay was later created for the employees of the City of Santa Ana in November 1958 through a Santa Ana City Council legislative enactment known as City Council Resolution No. 58-281 ("Resolution 58-281"). [ER 711-15]

At the time Sanchez received his merit pay Steps "D" and "E", old Section 1008 provided in relevant part, as follows:

> "An employee . . . shall be subject to . . . demotion . . . from his position . . . subject to the right of hearing by or appeal to the Personnel Board as provided in this Article. Each or any of these actions relating to suspension, demotion, or dismissal may be taken by the officer having power of appointment to the position on the grounds of incompetency, inefficiency, dishonesty, misconduct, insubordination, failure to observe department or City rules or the rules and regulations as provided in this Article, or failure to cooper-

> ate reasonably with his superiors or fellow employees . . . ."
>
> "A reduction in pay shall be treated as a demotion under this Section . . . ."

[Appendix Q; ER 907-08] The merit pay resolution, enacted six years after old Section 1008 and amended in 1968, over eight years before Sanchez was even hired, stated, in relevant part:

> "Advancement to either Step "D" or Step "E" may be granted only for continued meritorious and efficient service and continued improvement by the officer or employee in the effective performance of the duties of his or her position . . . . "
>
> Any officer or employee who is being paid on a salary step higher than Step "C" may be reduced by one or more steps, but not lower than Step "C" of the appropriate salary schedule, upon the recommendation of the head of the Department in which he or she is employed and the approval of the City Manager . . . ."

[Appendix P; ER 711-22]

The Ninth Circuit determined that under old Section 1008 (not Resolution 58-281), Sanchez had a vested property

right to merit pay at the time he began receiving his merit pay in 1978. [Appendix D.9-10] This determination is unsupported by fact or law: As explained above, merit pay was not even created until six years after the enactment of old Section 1008, and, as explained below, there is no legal basis for finding a property interest in discretionary merit pay herein.

B. THE NINTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT BY FINDING A PROPERTY INTEREST IN MERIT PAY WHERE THE RESOLUTION ESTABLISHING MERIT PAY DID NOT CREATE SUCH A PROPERTY INTEREST

In finding that Sanchez had a property interest in his merit pay protected by the Fourteenth Amendment, the Ninth Circuit relied upon the provisions of old Section 1008. [Appendix D.9-11] However, old Section

1008 is not the legislative enactment which created merit pay for Santa Ana City employees. Rather, merit pay was created pursuant to Santa Ana City Council Resolution 58-281. [ER 711-15] Moreover, old Section 1008 did not establish the basis for the granting or removal of merit pay; that too was set forth in Resolution 58-281 and amended by Resolution 68-123. [Appendix P; ER 711-22] Thus, until its amendment in 1978, because removal of merit pay was treated as a demotion, the most that old Section 1008 provided was a particular avenue of appeal (i.e., a Personnel Board hearing) when merit pay was being removed. Section 1008 did not, however, create a property right in merit pay; nor did it limit the reasons for which merit pay could be removed. [Appendix Q]

The due process requirements of the Fourteenth Amendment apply only to

liberty and property interests that are protected by the Fourteenth Amendment. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576, 92 S.Ct. 2701, 2708 (1972). A protected property interest in a benefit cannot be created by a mere subjective expectancy; rather, there must be a legitimate claim or entitlement to it. Roth, 408 U.S. at 577, 92 S.Ct. at 2709. See also, Perry v. Snidermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699 (1972) (a person's interest in a benefit must constitute an "entitlement" for due process purposes). Whether a constitutionally protected property interest in a benefit has been created must be determined by examining the statute or ordinance which established the benefit. Bishop v. Wood, 426 U.S. 341, 344-347, 96 S.Ct. 2074, 2077-78 (1976); Roth, 408 U.S. at 477, 92 S.Ct. at 2709.

There is no dispute that the legislative enactment which created merit pay for Santa Ana City employees was Resolution 58-281. It is also undisputed that the City was not required under the terms of Resolution 58-281 to pay any employee merit pay; nor was the City bound by Resolution 58-281 to continue paying merit pay to any employee. [Appendix P] In its discretion, the City could award merit pay, and similarly, could remove merit pay, if it concluded that the employee's performance did not warrant merit pay. [Appendix P] Resolution 58-281 does not entitle any employee to merit pay, and thus, Resolution 58-281 did not create any property interest in merit pay.

Old Section 1008, likewise, did not create a property interest in merit pay; indeed, it also did not in any fashion establish merit pay for the Santa Ana

City employees. Rather, and at best, old Section 1008 merely sets forth the particular avenue of appeal available to an employee whose merit pay is being removed, pursuant to Resolution 58-281. [Appendix Q]

The law is quite clear that simply because a governing body may provide a particular appeal for, inter alia, removal of merit pay, it does not create a vested property right in receiving merit pay where an entitlement thereto is not otherwise provided for in the statute establishing merit pay. Cf. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493 (1985) ("'[p]roperty' cannot be defined by the procedures provided for its deprivation. . . ."); Olim v. Wakinekona, 461 U.S. 238, 250-51, 103 S.Ct. 1741, 1748-49 (1983) ("[p]rocess is not an end in itself. Its constitutional purpose is

to protect a substantive interest to which the individual has a legitimate claim of entitlement.").[3/]

Accordingly, the Ninth Circuit's decision herein conflicts with well-established law concerning whether or not a constitutionally protected property

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3/ Other circuits, including the Ninth Circuit, have reached the same result. See, Weinstein v. University of Illinois, 811 F.2d 1091, 1098 (7th Cir. 1987) (stating that the rule that a procedure does not establish a property interest in the absence of an entitlement is "clear enough that even a willfully blind litigant cannot misunderstand"); Hogue v. Clinton, 791 F.2d 1318 (8th Cir. 1986) cert. denied, 479 U.S. 1008 (1986) (where a grievance procedure provided only an expectancy of review, not specific restrictions on the decisionmaking, plaintiff did not have a protected property interest); Clemente v. United States, 766 F.2d 1358, 1364 (9th Cir. 1985) cert. denied, 474 U.S. 1101 (1986) (to hold that procedural requirements create constitutionally cognizable property interests "would immediately incorporate virtually every regulation into the Constitution"); Veit v. Heckler, 746 F.2d 508, 511 (9th Cir. 1984) (nothing in the merit pay statute creates any expectation or entitlement to merit pay); Goodisman v. Lytle, 724 F.2d 818, 820 (9th Cir. 1984) (if the procedures impose no significant limitation on the decisionmaker, then no constitutionally protected interest is created in the procedures).

right in discretionary merit pay exists. Sanchez had no vested property interest in his merit pay because Resolution 58-281 created no entitlement, and the particular avenue of appeal set forth in old Section 1008 did not and could not create an entitlement. Thus, Sanchez had no property interest in his merit pay protected by the Fourteenth Amendment, and the Ninth Circuit's decision to the contrary conflicts with its own prior decisions, the decisions of other courts of appeal and the applicable decisions of this Court.

For these reasons, cross-petitioner respectfully requests that this Court grant a writ of certiorari on this important question of whether a City employee can have a protected property interest in merit pay, when the legislative enactment creating merit pay does not create such a property interest.

II.

WHETHER THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO DECIDE WHETHER, ASSUMING, ARGUENDO, THAT CROSS-RESPONDENT HAD A PROPERTY INTEREST IN HIS MERIT PAY, HIS PROPERTY INTEREST WAS DIVESTED BY DUE PROCESS OF LAW THROUGH THE LEGISLATIVE AMENDMENT OF SANTA ANA CITY CHARTER SECTION 1008

Even assuming that the Ninth Circuit correctly held that cross-respondent Sanchez had a property interest in pay awarded for meritorious work performance (although this is clearly a misunderstanding of the undisputed facts presented to the Ninth Circuit and a misapplication of the law), Sanchez's merit pay was removed in accordance with Resolution 58-281, as amended by Resolution 68-123, and a June 1978 amendment to City Charter Section 1008, which Charter Amendment was passed by a vote of the citizens of Santa Ana. [Appendices P, R, and D.10-11; ER 1215-16, 711-22] Accordingly, this Court

should grant a writ of certiorari under Rules 10.1(a) and 10.1(c) to decide the important question of whether due process rights are violated when a property right is divested through the legislative/electoral process.

In reaching its decision that the City had not afforded Sanchez due process, the Ninth Circuit found that the amendment to old Section 1008 affected Sanchez's right to continued receipt of merit pay and took effect after Sanchez had reached merit Step "E", and thus, "The City could not arbitrarily take away Sanchez's right to continued receipt of merit pay simply by amending Section 1008." [Appendix D.11] This statement conflicts both with decisions of this Court and with law established throughout the other circuit courts.

Long ago, this Court determined that there is no due process violation when a

property right is divested by the electoral process. In Bi-Metallic Investment Company v. State Board of Equalization, 239 U.S. 441, 36 S.Ct. 141 (1915), the Court rejected a plaintiff's due process challenge to a tax assessment passed by the state tax board. Plaintiff had claimed that he had no opportunity to be heard before the assessment was passed. Id. The Court stated:

> "General statutes within the state power are passed that affect the person or property of individuals sometimes to the point of ruin. Their rights are protected in the only way that they can in a complex society, by their power, immediate or remote, over those who make the rule . . . There must be a limit to individual argument in such matters if government is to go on."

Id., 239 U.S. at 445, 36 S.Ct. at 142.

This Court has repeatedly re-affirmed Bi-Metallic's holding that there can be no procedural due process challenge when a property right is affected by the legislative/electoral

process. Logan v. Zimmerman Brush Co., 455 U.S. 422, 432, 102 S.Ct. 1148, 1156 (1982) (stating that a "welfare recipient is not deprived of due process when the legislature adjusts benefit levels"); Martinez v. State of California, 444 U.S. 277, 280-81, 100 S.Ct. 553, 557 (1980) (legislative act depriving a property right must be "wholly arbitrary or irrational" to violate due process rights); Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 1373 (1960) (holding that Congress may alter Social Security Act to deny benefits to which plaintiff had already become entitled).

The Ninth Circuit's determination herein that the amendment of old City Charter Section 1008, by an electoral vote, was an arbitrary deprivation of a property interest likewise conflicts with the decisions of other circuit courts. For example, in Jackson Court

Condominiums v. City of New Orleans, 874 F.2d 1070 (5th Cir. 1989), the Fifth Circuit recently held that a City Council's decision to prohibit time-share condominiums did not violate a real estate developer's procedural due process rights. In this regard, the court stated, "it is well established law that once an action is characterized as legislative, procedural due process requirements do not apply." Id., at 1074 (emphasis added). See also, Rogin v. Bensalem Township, 616 F.2d 680, 693-94 (3rd Cir. 1980) cert. denied, 450 U.S. 1029 (1981) (holding no due process violation in amendment to township's zoning ordinance, stating, "Long ago, the Supreme Court decided that the protections of procedural due process do not extend to legislative actions.") (emphasis added).

Thus, by deciding that via a legislative amendment to old Section 1008, the City "arbitrarily" removed Sanchez's property right in merit pay, the Ninth Circuit has decided a question of constitutional law both contrary to the decisions of this Court and conflicting with well-established law throughout the circuit courts. Accordingly, the City respectfully requests that the Court grant this Cross-Petition for Writ of Certiorari to resolve this conflict of decisions.

III.

WHETHER THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO DETERMINE WHETHER ASSUMING, ARGUENDO, THAT PETITIONER HAD A PROPERTY INTEREST IN HIS MERIT PAY, AN APPEAL TO CAPTAIN HANSEN OR THE CHIEF OF POLICE DID NOT SATISFY PROCEDURAL DUE PROCESS REQUIREMENTS

The Ninth Circuit rejected Cross-Petitioner City's argument that the procedure followed by the City in

removing cross-respondent Sanchez's merit pay satisfied the constitutional requirements of procedural due process. The court stated, first that the court must apply federal law to decide the issue, and second that Sanchez was not given the administrative appeal due to him under state law. [Appendix D.12] In so holding, the court below did not apply the proper constitutional standard and has not followed either the decisions of this Court or the decisions of other circuit courts.

The Ninth Circuit expressly found that Captain Hansen (the person who had initially recommended that Sanchez's merit pay be reduced) responded on two separate occasions to Sanchez's request for the grounds upon which the decision was based. [Appendix D.6] The Ninth Circuit also found that Captain Hansen had informed Sanchez that he could

challenge the decision by meeting with Chief Davis. [Appendix D.6] Thus, the Ninth Circuit's determination that "Sanchez was never given an opportunity for a hearing of any kind. . ." [Appendix D.12] must be based on the court's finding that petitioner's opportunity to confront Captain Hansen and meet with Chief Davis was not a sufficient "hearing" as a matter of law. This decision, however, runs contrary to established federal law.

This Court has established in numerous decisions that all that is required to satisfy procedural due process is a meaningful opportunity to be heard. Logan, 455 U.S. at 433-34, 102 S.Ct. at 1156-57 ("As our decisions have emphasized time and again the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged."); Loudermill,

470 U.S. at 545, 105 S.Ct. at 1495 ("The essential requirements of due process . . . are notice and an opportunity to respond."); Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965) (Fourteenth Amendment requires "an opportunity [to be heard] . . . granted at a meaningful time and in a meaningful manner.").

The circuit courts agree that all that procedural due process requires is that the grievant be given an opportunity to protest the charges against him in a meaningful manner. See, e.g., Alberico v. United States, 783 F.2d 1024, 1027-28 (D.C. Cir. 1986) ("Once a property interest is shown, all due process requires is notice and an opportunity to be heard."); Reid v. Engen, 765 F2d 1457, 1463 (9th Cir. 1985) (procedural due process requires only adequate notice and an opportunity to be heard); Corstvet v.

Boger, 757 F.2d 223, 229 (10th Cir. 1985) ("An opportunity for a hearing provides due process whenever a party is reasonably notified of the pendency of an action against him and afforded an opportunity to appear.").

Procedural due process does not, however, require that the grievant be given an opportunity to be heard in the manner of his own choosing. Krison v. Nehls, 767 F.2d 344, 349 (7th Cir. 1985) ("[due process] does not require . . . that the opportunity be afforded at the time and manner of one's own choosing"); Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322, 325 (10th Cir. 1984) ("an individual entitled to such process is not entitled to dictate to the court the precise manner in which he is to be heard"). Nor does due process require that a full evidentiary hearing be conducted. Loudermill, 470 U.S. at 545, 105 S.Ct. at

1495 (defining the opportunity to be heard as "[t]he opportunity to present reasons, either in person or in writing, why proposed action should not be taken").

Cross-petitioner City could locate no federal decision establishing that procedural due process requires anything more than the opportunity to confront the initial decisionmaker. Indeed, the few federal decisions which have come close to deciding the issue have indicated that all that is required is an appeal to the initial decisionmaker. Beattie v. Roberts, 436 F.2d 747, 751 (1st Cir. 1971) (rejecting terminated public school teacher's claim that hearing before the Committee which had already rejected his contract did not constitute due process); cf., Gray Panthers v. Schweiker, 652 F.2d 146, 162 (D.C. Cir. 1980) (discussing the policies behind the requirements of a

hearing as having an opportunity to confront the initial decisionmaker).

Indeed, several courts have stated that all that is required is that the hearing be "impartial," and the mere appearance of impartiality is not enough to violate due process requirements. Gorman v. University of Rhode Island, 837 F.2d 7, 14 (1st Cir. 1988) (fact that board member making disciplinary decision had previous negative contact with student did not deprive student of due process in disciplinary hearing); Crook v. Baker, 813 F.2d 88, 94 (6th Cir. 1987) (allegations of impartiality were not enough to find denial of due process); Corstvet, 757 F.2d at 229 ("a substantial showing of personal bias is required to disqualify a hearing officer or tribunal in order to obtain a ruling that a hearing is unfair"); Dirt, Inc. v. Mobile County Commission, 739 F.2d 1562, 1566

(11th Cir. 1984) (despite "clearly present" appearance of bias, no denial of procedural due process in hearing before commission).

The Ninth Circuit's determination herein that Sanchez was not afforded due process, although (1) he did confront the initial decisionmaker, Captain Hansen, through his written memorandums, (2) he received two separate responses from Captain Hansen with respect to the decision, and (3) he was told he could meet personally with Chief Davis to discuss the decision, contradicts the holdings of several other circuit courts, as cited above. Moreover, in its decision herein, the Ninth Circuit has severely restricted this Court's well-established standard defining that which satisfies procedural due process, namely, a meaningful opportunity to be heard. Accordingly, this Court should grant a

writ of certiorari to resolve the important issue of what constitutes a sufficient "hearing" under the Fourteenth Amendment.

IV.

WHETHER THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO DETERMINE WHETHER CROSS-RESPONDENT CAN, ON A MOTION FOR SUMMARY JUDGMENT, ESTABLISH MUNICIPAL LIABILITY WITHOUT ESTABLISHING THAT A CITY'S "POLICYMAKER" DEPRIVED HIM OF DUE PROCESS

In affirming the district court's Partial Summary Judgment Order against the City with respect to cross-respondent Sanchez's due process claims, the Ninth Circuit refused to consider the City's claim that Sanchez had failed to meet this Court's standards for granting summary judgment and for municipal liability, stating that the City had failed to raise the argument in its Opening Brief on appeal. [Appendix D.14] This determination, however, both

contradicts the decisions of several other circuit courts and leaves an important question regarding municipal liability in conflict.

A. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE NINTH CIRCUIT, IN CONFLICT WITH ITS OWN DECISIONS AND THE DECISIONS OF OTHER CIRCUIT COURTS, REFUSED TO CONSIDER AN IMPORTANT ISSUE BECAUSE OF A PROCEDURAL DEFECT AND WITHOUT A SHOWING OF PREJUDICE

Cross-petitioner City seeks a writ of certiorari on this issue based upon United States Supreme Court Rules 10.1(a) and (c).

The Ninth Circuit overlooked an important rule applied throughout the circuit courts (including the Ninth Circuit) regarding procedural defects on appeal. Those courts have held that a court has discretion to ignore procedural defects on appeal, particularly where the other party has not been misled or

prejudiced, or where the issue was explored, even if not correctly stated. As the Ninth Circuit itself stated in Ellingson v. Burlington Northern, Inc., 653 F.2d 1327, 1332 (9th Cir. 1981), "This court may consider the issue [first raised in a reply brief] when the appellee has not been misled and the issue has been fully explored." See also, Int'l Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1404, n.4 (9th Cir. 1985) ("We recognize that we have discretion in certain cases to consider improperly presented claims of error, where the appellee is not misled and the issue has been fully explored.")

Several other federal decisions have likewise recognized that an appellate court has discretion to ignore procedural defects. HECI Exploration Co. v. Holloway, 862 F.2d 513, 525 (5th Cir. 1988) ("The decision whether to entertain

an argument not properly presented for appeal . . . is within the discretion of the court."); National Controls Corp. v. National Semiconductor Corp., 833 F.2d 491, 496, n.4 (3rd Cir. 1987) (rejecting appellee's argument that the issue of proximate cause was not preserved for review based on liberal reading of appellant's argument that there was no evidence to support damages award); Sanders v. Washington Metropolitan Area Transit Authority, 819 F.2d 1151, 1153 (D.C. Cir. 1987) (court would decide issue based on broad reading of argument on appeal); Kincade v. General Tire and Rubber Co., 635 F.2d 501, 504 (5th Cir. 1981) ("As a general rule, briefs are read liberally with respect to ascertaining what issues are raised on appeal. . . .").

The exercise of this discretion, recognized by several courts (including

the Ninth Circuit), was clearly warranted in this case. Whether Sanchez had proved all of the necessary elements of his due process claim in order to be granted partial summary judgment against the City (thus including whether the City can be held liable as a matter of law) was raised, albeit perhaps broadly, in the City's Opening Brief on appeal. [Appendix S] Moreover, in response to Sanchez's motion for partial summary judgment (as early as 1983) and again in the City's Opening Brief on appeal, the City argued that the City Manager could overrule Chief Davis under the City's grievance procedure. [Appendix S; ER 1225] These arguments inherently raise the issue of whether Captain Hansen or Chief Davis are final "policymakers" and, therefore, whether the City can be held liable under 42 U.S.C. § 1983 for their decisions.

In sum, the issue of whether the decision to remove Sanchez's merit pay was made by an official policymaker was explored fully throughout this litigation, and clearly was raised in the City's Opening Brief on appeal, thus Sanchez would not have been prejudiced by the Ninth Circuit's deciding the issue. Accordingly, the Ninth Circuit ignored its own precedent and decisions of at least three other circuits in refusing to decide the issue.

B. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE, ON SUMMARY JUDGMENT, CROSS-RESPONDENT IN ATTEMPTING TO ESTABLISH MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983 FAILED TO SATISFY THE REQUIREMENTS OF FED. R. CIV. P. 56(c) BY FAILING TO ESTABLISH THAT A CITY POLICYMAKER DEPRIVED HIM OF DUE PROCESS

This Court has ruled that in order to prevail on a motion for summary judgment, the moving party must satisfy the requirements of Fed. R. Civ. P. 56(c)

by establishing that he is entitled to judgment as a matter of law. Cf., Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, (1986) (whatever is before the court must demonstrate that the standard set forth in Fed. R. Civ. P. Rule 56(c) is satisfied). This Court has also ruled that as an essential element to establish municipal liability under 42 U.S.C. § 1983, a plaintiff must establish that the City's policymakers acted to deprive him of due process of law. Jett v. Dallas Independent School District, 491 U.S. 701, 109 S.Ct. 2702, 2723 (1989) (plaintiff must establish as a matter of law that school district actors were policymakers before Section 1983 liability attaches to school district); Pembaur v. City of Cincinnati, 475 U.S. 469, 483, 106 S.Ct. 1292, 1300 (1986) (municipal liability under Section 1983 attaches only where a deliberate

choice to follow a course of action is made by an official with responsibility for establishing final policy with respect to the subject matter in question); see also, City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915 (1988).

This Court should not allow Sanchez to prevail without proving every element on summary judgment, due to what the appellate court saw as a procedural defect, particularly when the missing element involves an important issue such as municipal liability.

This Court has repeatedly granted a writ of certiorari in recent years to define the important issue of what constitutes an "official act" in order to impose municipal liability. Praprotnik, 485 U.S. 112, 108 S.Ct. 915 (1988) (granting writ of certiorari in order to decide important question of whether

decisionmaker's act which is not part of a rule or formal process may be basis for municipal liability, and to clarify Pembaur); Pembaur, 475 U.S. at 483, 106 S.Ct. at 1300 (1986) (municipal liability under Section 1983 attaches only where a deliberate choice is made by an official with responsibility for establishing final policy). In fact, this Court's most recent clarification of municipal liability was not decided until after the City filed its Opening Brief on appeal. Jett, 491 U.S. 701, 109 S.Ct. 2702 (1989) (cross-petition for writ of certiorari granted to clarify the Court's decisions in both Praprotnik and Pembaur).

Sanchez prevailed on his procedural due process claim in a pre-trial Motion for Partial Summary Judgment. The court of appeals reviews the granting of summary judgment by the district court de novo. Mead Reinsurance v. Granite State

Ins. Co., 873 F.2d 1185, 1187 (9th Cir. 1988). Accordingly, in order to uphold the District Court's grant of summary judgment to Sanchez, the Ninth Circuit must have found that Sanchez was entitled to judgment against the City as a matter of law and, therefore, that Sanchez established that he was denied procedural due process pursuant to an official City policy or by an act of a City policymaker. Praprotnik, 485 U.S. 112, 108 S.Ct. at 926.

Sanchez failed to establish, or even allege (nor can he allege) in his Motion for Partial Summary Judgment that the City's policymakers were responsible for depriving him of due process. Sanchez has conceded that neither the enactment nor amendment of Resolution 58-281, nor old Section 1008, nor new Section 1008 deprived him of his due process rights. Indeed, in his Motion for Partial Summary

Judgment, Sanchez alleged that if Chief Davis and Captain Hansen simply had followed Resolution 58-281 and the appeal procedure permitted under old or new Section 1008, he would have received the requisite due process. [ER 1201-11] Accordingly, because Sanchez failed to allege, much less establish, any violation of his due process rights was pursuant to an official policy, as required by Praprotnik and Jett, the City cannot be held liable under Section 1983 as a matter of law. Thus, cross-respondent failed to satisfy the requirements of Fed. R. Civ. P. Rule 56(c) in his Motion for Partial Summary Judgment and, therefore, he was not entitled to summary judgment on his due process claim.

Moreover, there was at least a question of fact as to whether the decision to remove Sanchez's merit pay

was made by a final "policymaker," a necessary element to grant Sanchez summary judgment under Pembaur, Praprotnik and Jett. The Ninth Circuit expressly found that Captain Hansen recommended and Chief Davis approved the removal of Sanchez's merit pay. [Appendix D.6-7] There was never a finding, however, that either of these two individuals was a final policymaker. Jett, 491 U.S. 701, 108 S.Ct. at 2723 (1989) ("the trial judge must identify those officials or governmental bodies who speak with final policymaking authority"); Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3rd Cir. 1990) (police commissioner was not final policymaker, and did not acquiesce or authorize sexual discrimination in order to impose municipal liability under Section 1983); Crowley v. Prince George's County, 890 F.2d 683, 687 (4th Cir. 1989)

(no county liability under Section 1981 for employees' alleged discrimination based solely on county police chief's authority to make personnel decisions). Moreover, (as stated above) Sanchez himself argued throughout his Motion for Partial Summary Judgment that Davis and Hansen violated established City procedures when removing his merit pay -- thus, Sanchez himself raised an issue of fact as to whether the action was taken in accordance with an official policy.

In sum, the Ninth Circuit relied on a procedural defect to avoid deciding an important issue involving municipal liability, and thereby allowed Sanchez to avoid establishing every element of his Section 1983 claim on summary judgment. In so doing, the Ninth Circuit ignored the recent decisions of this Court as well as the decisions of several other circuits. Thus, this Court should grant

a writ of certiorari to resolve the controversy between the Ninth Circuit, this Court and the various other circuits and to decide an important issue involving municipal liability which the Ninth Circuit ignored.

V.

WHETHER THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO DETERMINE WHETHER THE SINGLE ACT OF REMOVING DISCRETIONARY MERIT PAY CAN CONSTITUTE A CONSTRUCTIVE DISCHARGE

Affirming the jury's verdict on Sanchez's constructive discharge claim, the Ninth Circuit stated:

> "Moreover, significant aggravating factors were present. Sanchez lost his merit pay Step "E" on the same day that he left work suffering from a stress reaction. His merit pay Step "D" was removed while he was on an approved medical leave of absence. Most significantly, Sanchez's repeated attempts to invoke the grievance procedure were rebuffed."

[Appendix D.15] The Ninth Circuit also specifically found, however, that: (1)

Captain Hansen explained to Sanchez the reasons for removing his merit pay, (2) Sanchez was given the opportunity to meet with Chief Davis to complain, and (3) Sanchez had the grievance procedure explained to him by Lieutenant Jordan. [Appendix D.7] All of these findings establish that Sanchez was, (and the Ninth Circuit actually found that he was), in fact, given the opportunity to invoke the grievance procedure.

Thus, the only "aggravating factors" which the Ninth Circuit could have relied upon in affirming the finding of a constructive discharge was the timing of the removal of Sanchez's merit pay. 4/ However, there has never been a finding

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4/ Moreover, there could be no other basis for finding "aggravating factors." In the companion opinion hereto, the Ninth Circuit determined that there was no "discriminatory atmosphere" [Appendix 0.19], that the City was not liable for racial retaliation [Appendix 0.21], and that there was no conspiracy to violate Sanchez's constitutional rights. [Appendix 0.24]

that there was anything unlawful or improper about the timing of the removal of his merit pay. Indeed, the only improper conduct for which the jury was to assess damages was the technical due process violation found by the district court on summary judgment. More importantly, the Ninth Circuit's determination that the timing of the merit pay removal constitutes sufficient "aggravating factors" conflicts both with Ninth Circuit precedent and the decisions of several other circuits.

Virtually every Ninth Circuit decision has determined that a constructive discharge claim cannot be based on a single act, and that something much more than a demotion or reduction in pay is required to support a constructive discharge claim. Thomas v. Douglas, 877 F.2d 1428, 1434 (9th Cir. 1989) ("aggravating factors" insufficient to find

constructive discharge where no evidence of harassment, violent acts, punishment or retaliation); Watson v. Nationwide Insurance Co., 823 F.2d 360, 361 (9th Cir. 1987) (constructive discharge based on several incidents of discrimination and conspiracy and several days of abuse and harassment); Satterwhite v. Smith, 744 F.2d 1380, 1382 (9th Cir. 1984) (requiring a "continuous pattern of discriminatory treatment"); Lojek v. Thomas, 716 F.2d 675, 682-83 (9th Cir. 1983) (no constructive discharge claim where complaint was based only on losing pension rights); Nolan v. Cleland, 686 F.2d 806, 813 (9th Cir. 1982) ("numerous adjudicated instances of discrimination" supported constructive discharge claim).

Likewise, at least five other circuits have established that there must be a stronger showing of aggravating factors than the showing made herein to

support a constructive discharge claim and that a single act, such as a demotion or reduction in pay, is not sufficient. For example, in Jurgens v. E.E.O.C., 903 F.2d 386, 391-93 (5th Cir. 1990), the Fifth Circuit declined to find constructive discharge where the plaintiff had shown only a demotion, coupled with a pattern of discrimination which allegedly created an unlikeliness of further promotion. The court stated:

> "However, without continuing harassment or repeated discriminatory impediment to an advance . . . (citations), dimmed future job prospects . . . are not alone enough to support a finding of constructive discharge."
>
> * * *
>
> "Aggravating factors include hostile working conditions and any other evidence suggesting any invidious intent on the part of the employer in creating or perpetuating the intolerable conditions . . . ."

Id. at 393, n.10.

See also: Levendos v. Stern Entertainment Co., 860 F.2d 1227, 1232-

33 (3rd Cir. 1988) (allowing jury to decide constructive discharge claim where evidence of "several incidents" which might meet "aggravating factors" test); Yates v. AVCO Corp., 819 F.2d 630, 636-37 (6th Cir. 1987) (no constructive discharge based on single act by sexual harasser); Cockrell v. Boise Cascade Corp., 781 F.2d 173, 177-78 (10th Cir. 1986) ("The finding of a constructive discharge must be justified by the 'existence of certain "aggravating factors."'" (citations omitted)); Geisler v. Folsom, 735 F.2d 991, 995-96 (6th Cir. 1984) (no constructive discharge despite "deplorable attitude" of supervisor towards women); Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982) (allowing constructive discharge claim to be decided by jury based on several incidents); Pittman v. Hattiesburg Municipal Separate School District, 644 F.2d 1071,

1077 (5th Cir. 1981) (no aggravating circumstances and no constructive discharge based on unequal pay, despite two years of repeated complaints); Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981) (constructive discharge based on a continuous pattern of discriminatory treatment; "[p]laintiff does not claim only a single instance of nonpromotion, or even a single period of nonpromotion").

Thus, the Ninth Circuit's determination herein that a finding of constructive discharge may be based on only a reduction in pay (even over a period of time) directly conflicts with decisions of the Fifth Circuit and the District of Columbia Circuit in Jurgens v. E.E.O.C. and Clark v. Marsh, respectively. Moreover, the Ninth Circuit paid only lip service to the "aggravating factors" standard which has

been followed almost universally. Accordingly, the Court should grant a writ of certiorari to resolve the conflict between the Ninth Circuit's decision herein and decisions of the various circuits and to decide the important question of what is required to prove a constructive discharge.

CONCLUSION

In sum, the Ninth Circuit below erroneously determined that: (1) Sanchez had a property interest in merit pay (although the statute relied upon did not create an entitlement or an interest), (2) he was deprived of that property right without due process of law (although the "deprivation" was the result of a legislative act, and Sanchez was granted a hearing), (3) it would not consider the important question of municipal liability because of a mere

procedural defect, and (4) the single act of removing merit pay could constitute a constructive discharge. In reaching its decision, the Ninth Circuit has created a conflict with this Court's decisions and the decisions of several other circuit courts, likewise raising important questions warranting the Supreme Court's review. Accordingly, cross-petitioner City respectfully requests that the Court grant this Cross-Petition for Writ of Certiorari.

DATED: June 23, 1991

Respectfully submitted,

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By:_____
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APPENDIX P

SECTIONS 7 AND 8 OF
SANTA ANA CITY COUNCIL
RESOLUTION NO. 58-281
[AS AMENDED BY RESOLUTION NO. 68-123]

Section 7. Advancement Within Schedules. The following regulations shall govern salary advancements within schedules:

(a) Length of Service Advancements. After the salary of an officer or employee has been first established and fixed under this plan, such officer or employee shall be advanced from step A to step B or step B to step C, whichever is the next higher step to that on which the officer or employee has been previously paid, effective the first day of the month following the date of completion of the length of service required for such advancement as provided in Section 2 hereof.

(b) Merit Advancements. An officer or employee shall be considered for advancement from step C to step D or from step D to step E upon the completion of the required length of service as provided in Section 2 hereof; the effective date of such merit increase, if granted, shall be the first day of the month following the completion of such required length of service. Advancement to either step D or step E may be granted only for continued meritorious and efficient service and continued improvement by the officer or employee in the effective performance of the duties of his or her position. Such merit advancement shall require the following:

(1) There shall be on file in the office of the Director of Personnel a copy of each periodic efficiency or performance report required to be made on the officer or employee by

the department head during the period of service time of such officer or employee subsequent to his last salary advancement. This requirement shall include copies of all periodic reports required by Civil Service Rules and Regulations and/or the City Manager.

(2) The head of the department in which the officer or employee is employed shall, at least twenty days prior to the anticipated completion of such officer or employee's required length of service, file with the City Manager a statement recommending the grant or denial of the merit increase and supporting such recommendation with specific reasons therefore. The officer or employee shall be notified by the department head as to such

recommendation and shall be informed of the reasons therefore.

(3) No advancement in salary above Step C shall become effective until approved by the City Manager, except when placement in a salary step above Step C results from a promotion under the provisions of Section 9 herein.

(c) Length of Service Required When Advancement Denied. When an officer or employee has not been approved for advancement to the next higher salary step, he or she may be reconsidered for such advancement after the completion of six (6) months of additional service. This reconsideration shall follow the same steps and shall be subject to the same actions as provided in the above paragraphs of this section.

Section 8: Reduction in Salary Steps. Any officer or employee who is

being paid on a salary step higher than Step C may be reduced by one or more steps, but not lower than Step C of the appropriate salary schedule, upon the recommendation of the head of the department in which he or she is employed and the approval of the City Manager. Procedure for such reduction shall follow the same procedure as outlined for merit advancements in Section 7, and such employee may be considered for readvancements under the same provisions as contained in subsection (c) of Section 7.

APPENDIX Q

SANTA ANA CITY CHARTER
SECTION 1008
[ADOPTED NOVEMBER 4, 1952]

SECTION 1008. Suspensions, Demotions, Dismissals.

The board of officers having appointive power are vested with the right to exercise the disciplinary and removal powers hereinafter provided.

An employee serving a probationary period in a position in the Competitive Service shall be subject to suspension without pay for a period not to exceed thirty days or to dismissal by the officer having the power of appointment, and the employee so disciplined or discharged shall not have a right of appeal, except that an employee who held permanent status in some other position or employment included within the Competitive Service immediately prior to his appointment to probationary status

shall not be discharged from the service of the City without right of appeal to the Personnel Board in the manner prescribed in this Section.

An employee, other than one serving a probationary period, holding a position in the Competitive Service shall be subject to suspension without pay for a period not to exceed thirty days in any one calendar year, or to demotion, or to dismissal from his position and from the municipal service, subject to the right of hearing by or appeal to the Personnel Board as provided in this Article. Each or any of these actions relating to suspension, demotion, or dismissal may be taken by the officer having power of appointment to the position on the grounds of incompetency, inefficiency, dishonesty, misconduct, insubordination, failure to observe department or City rules or the rules and regulations as

provided for in this Article, or failure to cooperate reasonably with his superiors or fellow employees.

Such employee shall be entitled to receive, upon is request, at the office of the board or officer taking such action, not later than the third business day thereafter, a written statement in which shall be separately stated each of the charges against him upon which such suspension, demotion, or removal is based, a copy of which statement shall be filed by the appointing power bringing the charges with the Personnel Board, the Clerk of the Council, and the City Manager. The employee shall have ten days after receipt of such statement within which to file an answer to the charges should he desire to do so.

The answer shall be filed in the offices of the Personnel Board, the Clerk of the Council, and the City Manager. In

his answer, or otherwise if no statement of charges has been made available to him as required, such employee may request a hearing by the Personnel Board to review such suspension, demotion, or dismissal which hearing shall be called and held in the manner provided for in the civil service rules and regulations. If a hearing is requested, the Personnel Board shall thereupon set a date for hearing the matter, which date shall not be sooner than five nor longer than ten days after the filing of the request for hearing. Hearings may be conducted informally and the rules of evidence need not apply. Such employee shall have an opportunity at such hearing to be heard in person or by counsel and the right to subpoena witnesses. All hearings held under the provisions of this Section shall be open to the public.

APPENDIX Q.4

The Personnel Board shall make written findings which shall state as to each charge whether or not such charge is sustained. The Personnel Board shall also set forth in writing its conclusions and recommendation based upon such findings and within ten days after concluding the hearing, it shall certify its findings, conclusions, and recommendation to the board or officer from whose action the appeal was taken, and to the City Manager and the City Council.

If, with respect to a suspension, demotion, or dismissal, the Personnel Board shall conclude that the employee charged was not guilty of the act resulting in such suspension, demotion, or dismissal, a recommendation by it of reinstatement without loss of pay shall be binding upon the appointing power who forthwith shall order such reinstatement.

APPENDIX Q.5

In the event that the Personnel Board shall conclude that the employee was guilty of the act resulting in such suspension, demotion, or dismissal but that the penalty was not warranted under the circumstances, a recommendation by it of reinstatement with loss of pay shall be binding upon the appointing power who forthwith shall order such reinstatement with loss of pay. The conclusions and recommendations of the Personnel Board as to reinstatement with or without loss of pay shall be final and no appeal may be taken therefrom.

If, with respect to a suspension, demotion, or dismissal, the Personnel Board concludes that such suspension, demotion, or dismissal was warranted, any recommendations by it shall be advisory only and shall not be binding on the appointing power and, in such instance, the decision of the appointing power

shall be final and no appeal may be taken therefrom.

Vacancies created under this Section may be filled by the appointing power by temporary appointment pending the completion of any proceedings taken hereunder.

A reduction in pay shall be treated as a demotion under this Section, unless the reduction in pay is part of a plan to reduce salaries and wages in connection with a general economy or curtailment program. A failure to grant an increase in pay at a time when an increase would otherwise have been granted as part of a plan to increase salaries and wages throughout the City service shall likewise be treated as a demotion under this Section.

APPENDIX R

EXCERPT OF SANTA ANA
CITY CHARTER SECTION 1008
[AS AMENDED JUNE 6, 1978]

SECTION 1008: Suspensions, Demotions, Dismissals.

* * *

A reduction in pay shall be treated as a demotion under this Section, unless the reduction in pay is part of a plan of reclassification of positions or of a plan to reduce salaries and wages in connection with a general economy or curtailment program, or is the result of a finding by the appointing authority that the employee's performance does not justify the continuance or a level of pay that is dependent upon meritorious service. A failure to grant an increase in pay at a time when an increase would otherwise have been granted as a part of a plan to increase salaries and wages

throughout the city service shall not be treated as a demotion under this Section.

APPENDIX R.2

APPENDIX S

EXCERPTS FROM CROSS-PETITIONER'S

OPENING BRIEF ON APPEAL

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred by granting plaintiff Sanchez partial summary judgment on his procedural due process claim.
2. Whether there was a material issue of fact for jury determination as to whether the grievance procedure provided for appeal to the City Manager.
3. Whether plaintiff Sanchez waived his due process claim by failing and/or refusing to follow the available grievance procedure.
4. Whether plaintiff Sanchez's procedural due process claim is barred under Parratt v. Taylor, 451 U.S. 527 (1981).

APPENDIX S.1

5. Whether the singular act of removing plaintiff Sanchez's merit pay for six months can constitute a constructive discharge.

6. Whether plaintiff Sanchez's emotional distress claim was barred by his worker's compensation award.

7. Whether the jury award was contrary to the law and/or evidence.

All of the issues set forth herein are questions of law, which this Court reviews de novo. Jauregui v. City of Glendale, 852 F.2d 1128, 1131 (9th Cir. 1988).

MEMORANDUM OF POINTS AND AUTHORITIES

I.

THE GRANTING OF SUMMARY JUDGMENT IN FAVOR OF SANCHEZ ON HIS DUE PROCESS CLAIM WAS ERROR

* * *

A. Under Logan, The Administrative Appeal Available to Sanchez Satisfied The Due Process Clause of The United States Constitution

* * *

3. There was a material issue of fact for jury determination as to whether the grievance procedure provided for appeal to the City Manager

The pivotal factor in the Court's granting partial summary judgment regarding Sanchez's due process claim was its erroneous conclusion that the only appeal of the decision to remove Sanchez's merit pay steps was to Chief Davis. The District Court's Conclusion

of Law Number 3, filed with its Decision, states:

> "Allowing plaintiff Sanchez to appeal the decision to remove his merit pay steps to Chief Davis, who had participated in the original decision to remove the steps, did not constitute an administrative appeal." [ER 366]

However, the uncontroverted evidence adduced at trial and in opposition to plaintiff's motion established that:

(1) Captain Hansen made the decision to confirm the recommendation of Sanchez's immediate supervisors that Sanchez was not performing at a level warranting merit pay, and to remove merit pay step "E"; [ER 708; Ex. 415]

(2) Captain Hansen made the decision to not impose recommended suspensions in two pending disci-

plinary actions, and instead, remove one merit pay step (step "D"), because of a demonstrated failure of Sanchez to perform at a merit pay level; [ER 708-709; Ex. 244; RT 8640:20-24] and

(3) Sanchez could appeal the above two decisions to Chief Davis and, if not satisfied with the result, he could appeal to the City Manager. [ER 709; RT 2950:19-2951:16; 2944:2-13; 7284:21-7285:9; 5594:4-5595:6; 8623:3-8624:8]

Thus, assuming arguendo that federal due process requires an "administrative appeal" all the way to the City Manager for all merit step removals, there clearly existed a material issue of fact as to (1) whether Captain Hansen was the initial decisionmaker, and (2) whether the grievance procedure provided for appeal to the Santa Ana City

Manager from the decision of the Chief of Police, thus, making summary judgment inappropriate.

While the grievance procedure itself was not in written form,[1/] there can be no question that the policy and practice of the City of Santa Ana was to allow appeal of the Department Head's decision to the Santa Ana City Manager. No documentation, testimony, or other evidence was presented by plaintiff Sanchez which indicated Sanchez was precluded from appealing a decision of Hansen to the Chief, and a decision of the Chief to the City Manager.

1/ Some confusion arose in the District Court because the grievance procedure contained in the Santa Ana Police Department Rules and Regulations was in written form, while the City's grievance procedure was not. Nevertheless, the confusion is immaterial as the testimony and documentation establishes that the City Manager is the final authority under any grievance procedure.

Furthermore, none of the documentary evidence before the Court even suggested that Sanchez could not appeal to the City Manager. Those documents simply advised Sanchez what his "next step" in the procedure was. [ER 710; Ex. 247] Indeed, the April 4, 1979 memorandum from Hansen to Sanchez regarding his merit pay removals states in paragraph one:

> "The original of your memorandum has been provided to the [Chief's] office and you may elect to ask for a personal interview with [the Chief] upon his return. This choice is yours based on our grievance procedure and your further pursuit of our grievance procedure will be predicated upon your choice." (Emphasis added) [ER 708; Ex. 244]

There is absolutely no language in that memorandum which terminates the grievance procedure at the Chief of Police. Rather, it is quite clear that Hansen is telling Sanchez that he may appeal Hansen's decision to the Chief,

the "next step" in the grievance procedure.

In a subsequent April 17, 1979 memorandum from Hansen to Sanchez regarding the merit pay removals, again, no limitation was placed on Sanchez's grievance; it merely instructs Sanchez as to his next step. The final paragraph of this memorandum states:

> "In my previous memorandum to you, I explained your next step in any grievance procedure would be to submit a written grievance to the Chief of Police or to request an interview with him. I also explained that your written request was sufficient, but that a personal interview is the normal course of action in our grievance procedure." (Emphasis added) [ER 710; Ex. 247]

None of the language suggests any limitation on the grievance procedure at the Chief's level; rather, this memorandum once again states that the Chief is Sanchez's next step.

Thus, even if the City was required by federal due process standards

to permit merit step removals to be appealed all the way to the City Manager -- an issue of law at the very least -- there was a triable issue of fact as to whether Sanchez could have appealed to the City Manager.

a. Four (4) witnesses testified at trial regarding the administrative appeal.

An appellate court ruling on the district court's decision to grant partial summary judgment may consider evidence which was later brought forth at trial and raised at the appellate court level. Kennedy v. Silas Mason Co., 334 U.S. 249, 256-57, 68 S.Ct. 1031, 1034 (1948); Smith v. U.S., 362 F.2d 366, 368 (9th Cir. 1966). This is particularly true where an important question is involved and substantial injustice might result from the appellate court's refusal

to consider the evidence. Id., Roberts v. Hollandsworth, 582 F.2d 496 (9th Cir. 1978). Accordingly, this court should consider the testimony adduced at trial which by itself raises a triable issue of fact if considered by the District Court and would have prevented the District Court from granting partial summary judgment for Sanchez. That evidence included the testimony of Chief Davis, Captain Hansen, Police Personnel Lieutenant Jordan, and City Personnel Director Bott that the grievance procedure provides for final review by the Santa Ana City Manager.

Chief Davis was questioned at length on the grievance procedure issue, and he testified unequivocally to the participation and final review by the City Manager. On February 27, 1985, Chief Davis testified as follows:

"Now grievance and the important issue we have to remember is people have rights in grievances. The officer has certain rights that are important, and that is the reason we try to get him to use the grievance process. Once they start the grievance process, then there is certain time frames that I have to answer, the supervisor has only so many days, and it forces the department to respond. . . . But if a person's got a grievance, we want the process to work, so he has the safeguards, so it forces every level of supervision to respond, so it forces -- in the grievance process, for example, I have only ten days in which to respond -- that will force me to do that. That protects the rights of the person who is doing the grievance, and then if he doesn't like my answer, he can go to the City Manager and the City Manager has to respond within a certain period of time." (Emphasis added.) [RT 2950:19-2951:16]

Later Chief Davis, testified as follows:

"Q. Now is the language of the rule that was in effect in 1977-78 in the grievance review procedure, is it mandatory or is it permissive language in terms of using that procedure?

"A. It certainly is permissive. In fact the first step encourages people to try and work out the process without going into the formal grievance process, but then once you enter the grievance process, then there becomes mandatory steps that must be followed, time limits, time frames, etc.

"Q. I see. So if you wanted to do a grievance, then the steps were mandatory. But you did not have to actually enter the process if you didn't wish to do so.

"A. Well, the basic grievance process is actually defined in two portions, an informal grievance or a formal grievance. The informal grievance is, as I just testified to, we encourage people if you have a problem with your sergeant, sit down and try to work it out if you can. That's an informal grievance, and we may even have a record of that. Then if you can't do that, then you file your formal grievance which then places into play that it has to be done. You then go to your lieutenant, and if you're not happy with that, then within "x" number of days, the captain has to respond, and if you're not happy with that, within 10 days I have to

respond, and then if you are not happy with that, I think the City Manager -- probably because he is the City Manager, he gets 30 days instead of 10, so . . . ." (Emphasis added.) [RT 2982:25-2984:2]

Then, again, on March 8, 1985, Chief Davis testified as follows:

"Q. By Mr. Westreich: Chief Davis, my question was when someone submits a grievance, does that grievance ultimately reach your desk for your consideration?

A. It may or it may not. If the grievance was resolved at a lower level, it may not get to me.

Q. If it doesn't get resolved to the satisfaction of the grievant, it will ultimately get to your attention and some decision will be made by your office within a fixed time frame set out in the grievance procedure. Is that right?

A. That is right, and the next step would be the City Manager. (Emphasis added) [RT 2944:2-13]

There is no confusion or ambiguity in the above testimony. Chief Davis' testimony (as well as the uncontradicted evidence) showed that the grievance procedure in effect at the time provided for appeal to the City Manager. Had Sanchez inquired as to his next step after the Chief, or had he pursued his grievance to the point where the Chief reviews it, he certainly would have learned that the next step was the City Manager. At the very least, Chief Davis' testimony raises a triable issue of fact as to whether Sanchez could have pursued an "administrative appeal" to the City Manager.

Donald Bott is the former Personnel Director for the City of Santa Ana. When called as a witness by plaintiff, he was not a member of the Police Department, nor a City of Santa Ana employee, and he had already been

dismissed as a defendant in this case. When questioned regarding the City of Santa Ana grievance procedure in effect from 1975-1979, he stated unequivocally that the procedure provided for review by the City Manager, and that the City Manager had the final say; stating:

> "Q. From 1974 through 1979 was there an existing grievance procedure for City employees?
>
> A. Yes.
>
> Q. And did that grievance procedure apply to all City employees, including police department employees?
>
> A. Yes.
>
> Q. What was the final step in the grievance procedure?
>
> A. The final step would be before the City Manager, he would have the right to finally adjudicate the grievance.
>
> Q. Then the City Manager had the authority and ability to make the final decision and could overrule the department head's decision?

A. That's correct. (Emphasis added.) [RT 7284:21-7285:9]

In addition to Davis and Bott, two (2) other witnesses testified similarly that the City Manager was the final authority in the grievance procedure. Personnel Lieutenant Jordan, who is not a defendant, testified under questioning by plaintiff, as follows:

"Q. Again, in practice during this time period, did an officer have any right of appeal from the Chief of Police?

A. Well, yes, you always had -- well, I don't know if appeal is the right word again. If you lost a pay step and you felt for some reason that wasn't appropriate, we had a -- and still have -- a grievance process that you can grieve that particular thing. . . . But the grievance process, any personnel procedures can be grieved by any affected employee and he can go all the way to the City Manager if he's not happy with how the problem is resolved at any level.

Q. Under the grievance procedure that was in effect under the departmental rules and regulations -- not the memorandum of understanding, o.k.? -- so when it was only governed by the departmental rules and regulations, was it your understanding that in practice an officer -- that the City Manager could overrule the Chief of Police?

A. Absolutely, the Chief -- the City Manager is the boss of the City, and all the department heads work for him, and whatever he says, he's the boss.

Q. And do you know whether or not the departmental -- any departmental rule or regulation informed a police officer that such -- if not an appeal, let's say a resort to a higher authority above the Chief, was available?

A. I don't recall the exact wording of the grievance process in the rules and regulations, but I thought that that made it pretty clear. It was always clear to me." (Emphasis added.) [RT 5594:4-5595:6]

Likewise, Hansen testified as follows:

"Q. Now is an officer entitled to any kind of appeal process from the loss of his merit pay if it's done as a matter of discipline?

. . .

THE WITNESS: Yes, he is.

BY MR. WESTREICH:

Q. And if it is done as a matter of performance, not. Correct?

A. No, he's afforded an appeal process either way.

Q. What's the appeal process if it's a matter of administrative determination?

. . .

THE WITNESS: The manner in appeal would be first of all myself, then the Chief of Police, then the City Manager, if not satisfied, the Orange County Superior Court.

BY MR. WESTREICH:

Q. Now that is the procedure that was in effect in the late seventies?

A. Yes.

Q. And was that the grievance procedure you're referring to?

A. Yes." [RT 8623:3-8624:8]

There can be no doubt that all of the witnesses who testified regarding the grievance procedure, testified that final review was with the City Manager.

Thus, the evidence at trial demonstrated that, at the very least, there was a triable issue of fact as to whether an officer such as Sanchez could pursue an "administrative appeal" of a merit step removal beyond the Chief of Police. If he could have, but didn't for his own personal reasons, his claim must fail. Alternatively, if he claims that he didn't pursue this administrative appeal because he was somehow denied an opportunity, under Parratt v. Taylor, supra, he must pursue his state remedies.

(2)

No. 90-1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF SANTA ANA,
Cross-Petitioner,
vs.
JESSE J. SANCHEZ,
Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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CROSS-RESPONDENT'S STATEMENT OF THE CASE

A. Jurisdictional Statement

Plaintiff-appellee Jesse Sanchez claimed a due process violation in the removal of his merit pay [ER 10, 26], alleging emotional distress damages [ER 12], "a medically diagnosed stress reaction" [ER 11, 28], "work related disability" [ER 28], and "constructive discharge" while suffering a work-related disability [ER 26-27].

Santa Ana City Charter sec.1008 establishes that dismissal, suspension or demotion may occur only for specified forms of misconduct, and provides the due process to be followed in such cases. [Appendix Q]. Prior to June 1978, sec.1008 provided that "[a] reduction in pay shall be treated as a demotion under this section . . . ." [Appendix Q] [Exs 44:2; ER 909]. In the June 1978 city election, well after Sanchez

received his merit steps "D and "E", the charter was amended to add to the latter language in sec.1008 the further exception: "unless . . . the employee's performance does not justify the continuance of a level of pay that is dependent upon meritorious service." [Appendix R] [ER 941-42].

In the Joint Pretrial Conference Order filed June 21, 1982, the City stipulated to the following phrasing of Sanchez' due process claim: "whether defendants denied Sanchez procedural due process by following City Charter sec.1008, as amended in June 1978, when he was reduced from Salary Step E to Salary Step C in March 1979." [CR 116; ER 71-72, 120-21].

In a Motion for a Declaration of Law in Limine, filed August 2, 1982, defendants collectively asserted the constitutionality of Charter sec.1008, as amended in June 1978 [CR 122]. On February 7, 1983, the

City filed a Motion for Early Determination of Certain in Limine Issues, one of which sought a declaration of law that sec.1008, as amended in June 1978, is constitutional [CR 125].

Sanchez opposed this motion [CR 126] and made a counter motion for partial summary judgment -- i.e. that defendants City and Chief Davis had denied Sanchez due process of law in the successive deprivations of his Merit Steps "E" and "D", supported by stipulations of fact in the Pre-Trial Order and numerous documentary exhibits [CR 127-32, 147; ER 900-38, 949-50]. In responding to Sanchez' motion, the City and Davis offered no evidence or declarations, did not contend that there was any genuine issue of material fact, did not object to any of Sanchez' evidence in his motion, and did not assert good faith qualified immunity on

behalf of Chief Davis. [CR 149; ER 939-48]. Defendants confined their opposition solely to the argument that sec.1008 as amended in June 1978 is constitutional on its face and as applied retroactively to employees with merit pay steps which vested while the predecessor section was in force. [CR 149; ER 939-48].

On April 8, 1983 the district court issued an order, noting that defendants apparently did not understand that plaintiff had made a summary judgment motion, and affording the City and Davis an opportunity to further brief their opposition "includ[ing] admissible evidence" [ER 952-53](emphasis added).

Offered a second chance, defendants then argued that Sanchez was informed of his right to an "administrative appeal" via the grievance procedure and that that satisfied any due process requirement.

[CR 155.2]. Defendants offered no declarations, relying instead solely on several memorandums which plaintiff had already submitted in his motion. [CR 155.7-15]. The only grievance procedure identified by defendants in their memorandums to Sanchez, and in defendants' supplemental opposition, was "Section 10.77 of the SAPD Rules & Regs." [CR 155.15]. The latter expressly provided that the final decision under this procedure was with the chief of police, not the city manager. [Ex 66; CR 158].

Defendants again failed to contend at any point that there were any genuine issues of material fact. [CR 155]. Instead, defendants continued to argue that they were entitled to judgment as a matter of law because they had provided an administrative appeal via the grievance procedure and because "Sanchez was not

denied constitutional procedural due process by the retroactive application of amended City Charter section 1008, because he had no 'vested' right to the pre-amendment procedures and the procedure under the amended section 1008 was constitutionally valid." [CR 155.5-6]. Chief Davis again did not assert qualified immunity. [CR 155, 158; ER 955-63].

On June 3, 1983, the district court entered partial summary judgment on Sanchez' due process claim, reserving for trial the scope of damages [ER 362-63], and made findings of fact and conclusions of law [ER 364-67].

At the liability phase of trial on plaintiffs' remaining claims, the City and Davis moved orally for reconsideration of the summary judgment based on "new evidence" -- the sworn testimony at trial of Chief Davis and others that under some

unwritten city-wide grievance procedure which he could not identify or produce, Sanchez could have grieved the matter to the City Manager [Tr 4026-41]. The district court refused to reconsider, declaring that it had reviewed the matter at great length, that defendants had plenty of time to have done so earlier, and that the City had had access to Davis and his position at the time of the previous motion when the City had three (3) opportunities to brief the matter [Tr 4041-44].

On June 18, 1985, the district court directed a verdict on all remaining plaintiffs' claims [CR 585]. On June 28, 1985, with the jury yet to be discharged and the damage phase of the partial summary judgment remaining to be tried, the City and Chief Davis again moved for reconsideration of the partial summary judgment, again relying on the "new

evidence" at trial of an unwritten city-wide procedure permitting appeal to the city manager, and asserting qualified immunity for Chief Davis for the first time. [CR 587-89; ER 968-1014]. For the first time, defendants asserted the "waiver" argument. [ER 968-1014].

In making this motion, defendants still did not contend that this evidence established any genuine issue of material fact. Instead, in concluding, defendants urged once again that they were entitled to judgment as a matter of law. Defendants offered no explanation for their failure to produce this evidence earlier when afforded multiple opportunities to do so in connection with the summary judgment motion.

In none of the aforementioned briefings or motions did defendants even remotely suggest that there was any

question but that the retroactive application of amended sec.1008 was pursuant to an official policy to do so. Indeed, defendants repeatedly requested the district court to rule that this policy was constitutional as a matter of undisputed fact and law.

On September 17, 1985, the district court denied the City motion to reconsider the partial summary judgment, finding that it was not a proper motion to reconsider, and that in any event even if Sanchez had recourse to the City Manager, notwithstanding the clear record to the contrary, "there is no sufficient showing that plaintiff had notice that such an appeal was available." [ER 427-28]; further, it granted Chief Davis' motion for reconsideration, declaring that the "actions taken by defendant Davis cannot be reasonably found to be in violation of

clearly established law" entitling him to immunity, but not elaborating further [ER 428].

At no time during the damage phase of the jury trial did the City move orally or in writing, explicitly or in substance, for directed verdict on the sufficiency of the evidence, or on any issue, directly or indirectly, litigated during that damage phase. Judgment on the jury verdicts, finding a constructive discharge and awarding $400,000. for lost back and future pay, plus interest and benefits, and $500,000. for emotional injury and distress, was entered November 1, 1985 [CR 640, 641].

On November 22, 1985, the City made timely motions for JNOV and new trial including an unspecified attack on the sufficiency of the evidence and other arguments never raised in a directed

verdict motion, nor otherwise properly preserved in the record [ER 1073-1102]. On February 21 & 28, 1986, the City belatedly attempted to assert that Sanchez' due process claims were barred because of the adequacy of existing state post-deprivation remedies, mischaracterizing the motion as a "Request for Determination re Lack of Jurisdiction" to sidestep their failure to timely raise the issue.

Sanchez preserved his objections to the City improperly raising these matters by post-trial motion [CR 706, 711]; and objected to the untimely raising of a matter not preserved for trial in the Pretrial Order [CR 116] or the Amended Pretrial Order [CR 368], nor even included in the post-trial motions, by falsely characterizing it as a matter of a "lack of jurisdiction" [CR 757:1-6].

On May 30, 1986, the district court

rejected the asserted lack of jurisdiction, noting that the adequacy of state remedies does not preclude a federal claim when the claimed denial of due process did not arise from a "procedurally random and unauthorized deprivation"; where the "deprivation arose . . . from the failure of the City, through its enacted procedures and regulations, to provide plaintiff with a right to appeal"; where "it is clear to the Court that even if there was a right of appeal to the City Manager, plaintiff was never made aware of this right"; where "it would have been practicable for the City to provide procedurally adequate process"; where "some established state procedure" or "the state system itself . . . causes the deprivation [ER 433-35]; further, that the City's attempted distinction between state and municipal officials is not supported by any authority, and that there is clear

contrary authority [ER 435].

The district court denied the motion for JNOV because the "[damages] trial . . . did not produce any evidence or theory which gives this Court any reason to now declare that the City is not liable . . . ." [ER 435-36] and because, as to the Carey defense that Sanchez' merit pay would have been removed even if he had been afforded due process, the "Court finds that the City failed to rebut the evidence of lost wages . . . and that there was sufficient evidence to justify the $400,000. award [ER 436].

The district court denied the motion for new trial, finding that defendants had utterly failed to produce any evidence at all and that "the City failed to meets its burden, and it should not be given another opportunity to mount a better defense through the granting of a new trial

[ER 436-37]. Final judgment was entered July 23, 1986 [ER 448-51] and Notice of Appeal was filed August 19, 1986 [CR 794; ER 454-55].

B. Cross-Respondent's Statement of Facts

Sanchez was hired by SAPD on September 16, 1975 as a police officer at salary step C, and progressed to merit salary step (two steps) by April 1, 1978 [ER 51]. On February 28, 1979, Sanchez' Sgt. Collins signed and submitted to Sanchez his annual performance rating, which declared "does not justify retention at a merit level" [Ex 415; ER 701-03]. On March 14, 1979, Commander Hansen, in a memorandum entitled "Recommended Disciplinary Action", recommended to Chief Davis that certain disciplinary actions against Sanchez be concluded with a loss of merit step "D" instead of suspension. [Ex 47; ER 52, 910-11].

On March 15, 1979, Sanchez left roll call, claiming emotional illness [Ex 52; ER 913-17]; later, the same date, Sanchez' merit step "E" was formally removed, retroactive to March 1, 1979 [Ex 46; ER 52, 909]. On March 20, 1979, Hansen revised his March 14, 1979 recommendation to Davis to read "Recommended Administrative Action" in lieu of "Recommended Disciplinary Action." [Exs 47, 48; ER 910-12]. The reduction of Sanchez' merit pay to step "C" was then approved by Chief Davis on March 26, 1979 [Ex 48; ER 912], effective April 1, 1979 [ER 52].

On March 30, 1979, in a memorandum addressed to Chief Davis and copied to Hansen and Stebbins, Sanchez made a timely, written demand for a written statement of charges, seeking to initiate the administrative appeal provisions of Charter sec.1008. [Ex 243; ER 920-23].

On April 4, 1979, Hansen invoked the City policy as reflected in the June 1978 amendment to sec.1008, informing Sanchez that removal of his merit pay was not based on any specific charges other than failure to perform at a level justifying merit pay, that no further disciplinary proceedings were pending against him, and that any appeal would be pursuant to the grievance procedure, orally or in writing, to Chief Davis [Ex 244; ER 924-25].

On April 13, 1979, Sanchez reiterated his efforts to initiate his right to administrative appeal via sec.1008. [Ex 246; ER 927]. On April 17, 1979, Hansen informed Sanchez again that removal of merit pay was predicated solely upon nonmeritorious service, and that Sanchez' only entitlement was to either request an interview with, or submit a written grievance to, Chief Davis [Ex 247;

ER 928]. On April 25, 1979, Sanchez was further informed by defendants that "sec.10.77 of the SAPD Rules & Regs. covers Grievance Procedure" [Ex 248a; ER 929].

Loss of the two (2) merit pay steps, on March 1, 1979 and April 1, 1979, respectively, resulted in a net reduction in Sanchez' monthly pay in the amount of $159. -- i.e. 10.25% of Sanchez' base pay [CR 125:11; ER 905]. Sanchez was entitled to reconsideration for reinstatement of one or both merit steps after six (6) months [Ex 247; ER 928]. On September 10, 1979, the City refused to reconsider restoration of Sanchez' merit pay step E as provided in the merit pay ordinance, though six (6) months had elapsed since removal of merit pay step. [Ex 55:11; ER 53].

Notwithstanding the mandatory timelines in the SAPD Grievance Procedure [Ex 66:26; ER 967], Chief Davis never

responded to Sanchez' written grievances of March 30, 1979 or April 13, 1979, addressed to Chief Davis, and complaining about the procedures and the criteria employed to remove his merit pay [ER 905].

Until June 30, 1979, the SAPD Grievance Procedure on its face provided for no appeal beyond the final decision of Chief Davis, a fact conceded by Chief Davis after he testified about the "unwritten city-wide grievance procedure" [Ex 66:26; ER 967[1]; RT 4082-84[2]]. The Memorandums of

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[1]. The Grievance Procedure provides, in its final three steps:

"f. A conference shall be held to discuss the grievance, at the request of the employee, the Chief of Police or the City Manager.

"g. The Chief of Police shall inform the employee of his action within 10 days after receipt of the request of the settlement.

"h. The original of the grievance form and the Chief's decision shall be filed in the Personnel Records of the Department."

Understanding [MOU] between the Police Association and the City did not address this question prior to June 30, 1979 [Exs 612, 613]. Effective June 30, 1979, the MOU's modified the grievance procedure to provide expressly for formal review, with written findings, by the City Manager [Exs 74a:31-33, 74b:31-33].

Sanchez did invoke the grievance procedure in two memorandums to Chief Davis on March 30, 1979, complaining about Collins' handling of two pending disciplines and the removal of his merit pay, one step having been retroactive,

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[2]. Chief Davis' testimony at trial:

"Q. Where in that grievance review procedure would you say is an indication to police department employees that the matter can be submitted to the City Manager after you have made your decision for a consideration . . . by the City Manager?

"A. I don't believe I have ever testified that." [RT 4082-83].

without affording him any opportunity to rebut the charges [Exs 243, 419; ER 920-23; RT 3946-49, 4053-56], and reiterated the substance of his grievance on April 13, 1979 [Ex 246; ER 927]. Chief Davis testified that "under normal circumstances" Sanchez' grievance should have received some response from him [RT 3950], since the grievance procedure mandates a response from him [RT 2950-51, 2983-84, 3943-44]. Davis never responded to any of these memorandums [RT 4062-68, 4124-27].

The following evidence was presented at the damage phase trial without being controverted by any evidence from the City.

The district court admitted into evidence the Findings of the Workers' Compensation Appeals Board, which had been based on the consensus of several psychiatric evaluations, including one who was retained by the City to evaluate

Sanchez [Ex 52; RT 9112, 9121-24], that: (1) Sanchez sustained an injury arising out of employment for the period 1977 to May 6, 1977, while employed as a police officer, consisting of an emotional disability [RT 9121]; (2) this injury caused temporary total disability from March 15, 1979, through April 7, 1979, and again from May 6, 1979, through January 10, 1980 [RT 9122, 9124]; and (3) Sanchez was in need of further medical care as of the date of said findings [RT 9123].

Dr. Robert Maurice, M.D. treated Sanchez from March 28, 1979, through August 1979, seeing him five times, due to episodes of anxiety [RT 9115-17, 9120]. He relied, in his testimony, on the reports of the examinations and opinions of Dr. Samuel Pilchman, 1/9/80[3], and Dr. Louis L.

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[3]. This expert was retained by the City.

Lunsky, 10/2/79 and 10/6/79, both of whom observed a serious stress reaction and concluded that Sanchez was in need of further medical care [RT 9123]. Dr. Maurice, who treated Sanchez during the period when his merit pay was being removed, testified that Sanchez, who was then on leave, was having anxiety attacks directly related to stress in employment -- i.e. a sudden onset of fear, often sweating, tremulousness and extreme fear -- which was worsening [RT 9115-17].

On June 21, 1979, Sanchez first complained of episodes of feeling "unreal" and voiced worries he might be losing his mind [RT 9128-29]. Dr. Maurice diagnosed this as "depersonalization" [RT 9129], explaining that this occurs when a person is under more stress than he can handle and is a way of distancing one's self from severe stress [RT 9119]. This

"depersonalization" indicated that the stress was getting worse [RT 9129].

On August 20, 1979, Dr. Maurice concluded that the anxiety attacks that Sanchez was having at that time disabled him from returning to SAPD [RT 9120-21], and wrote a letter suggesting so [Ex 75:1; RT 9120, 9133-35]. Dr. Maurice's letter, dated August 30, 1979, concluded that plaintiff Sanchez was able to resume employment "providing that the psychological stresses he encountered before are absent or eliminated" [RT 9135 (emphasis added)].

Dr. Maurice, asked to assume the truth of facts established by the district court's earlier summary judgment findings and conclusions [RT 9108-11], gave the opinion that each of those facts would tend to successively aggravate Sanchez's condition [RT 9126-27]. In explaining why

these successive events would cause progressive aggravation, Dr. Maurice stated that the failure of SAPD to provide an opportunity to answer the charges that led to the merit pay reduction "most certainly" served as an impediment to Sanchez' being able to work at SAPD with his mental health intact [RT 9139-40].

Dr. Louis L. Lunsky, M.D. examined Sanchez on October 2 & 6, 1979, and reviewed Sanchez' personnel file [RT 9144], records from Dr. Sanders, Dr. Maurice, and psychologist Alice Pittman [RT 9146], and medical records of Dr. Robert Galak, a treating psychiatrist for Sanchez from 4/9/84 to 4/1/85 [RT 9145; 9156-57]. Dr Lunsky concluded that as of October, 1979, shortly after Sanchez resigned, he had a mixed neurosis, depressive type [RT 9146], with intrusive symptoms of anxiety and depression which interfere with the ability

to work, with personal experiences, and with day to day activity [RT 9146-47].

Dr. Lunsky also saw evidence of marked depersonalization in Sanchez in October, 1979 [RT 9154], with signs of significant anxiety [RT 9153- 9154]. In Dr. Lunsky's opinion, Sanchez had a severe anxiety attack on March 15, 1979 [RT 9147] and his condition on March 15, 1979 was the same condition presented to Dr. Lunsky in October 1979, and had continued throughout that time frame [RT 9148]. Dr. Lunsky also expressed the opinion that the "assumed facts" [RT 9148-49] established by the district court's findings -- i.e. denial of due process -- played a very significant role in Sanchez' illness [RT 9149] and that reduction from Merit Step "E" to "C" would have an erosive effect on his self-esteem and self-worth, a symptom which he observed directly in October 1979 [RT 9152].

Sanchez testified that he first suffered anxiety attack in roll call, at 7:00 A.M. on March 15, 1979; felt disassociated and surge of anger, and thought about shooting an officer who had moved away from him when he sat down; he became scared by these thoughts and felt dizzy, and thought he would pass out; felt pain in his back, and could not breath; feared losing control and wanted to run from roll call. [RT 9195-98].

When he left work, he believed he was at "E" step, with only his previous sergeant's recommendation for loss of the "E" step, and his assurances he would have a chance to respond before a decision was made [RT 9200]. Sanchez first learned of decision to remove his "E" step on March 20, 1979, when he picked up his check covering the first two weeks in March [RT 9201]. When he picked up his next

paycheck, he learned of the removal of his "D" step; he never received any notice of the removal of either step from Chief Davis or Commander Hansen, nor any notice as to the "D" step at all [RT 9202-03]. He attempted to learn reasons for removal of his merit pay, and sought a hearing, but never received any specific statement of charges [RT 9203-06, 9224-26, 9229].

When he learned of the step "E" removal, he felt anger and that there was no solution; with the step "D", he felt anger, anxiety and fear, thinking: "These guys were just putting the final nails in my coffin as far as my police career was concerned," especially since he had been out on leave while it happened [RT 9207-08, 9221-22]. When he could not obtain any specific statement of charges or hearing he was frustrated because he felt there was no recourse; that he was being charged with

many things, but could not defend himself; he felt that Hansen was taunting him in his responses. [RT 9225-26].

When he was considering going back in September 1979, he "was terrified at that police department." [RT 9236]. On his return, Sanchez was placed on graveyard shift -- an informal means of punishment for someone previously on day shift -- under a Lt. Salazar, who had just completed an investigation of Sanchez' earlier discrimination complaints, which had resulted in Sanchez being disciplined for going outside the chain of command to the City's Affirmative Action Officer. [Exs 71-72; RT 9241].

Sanchez objected to this assignment. He also wrote to Chief Davis, requesting reinstatement of his merit pay given that the six (6) month reconsideration period had passed, and asked that Chief Davis

respond [Ex 55:11; RT 9241-44]. He never received any response from anyone [Ex 55; RT 9244-45]. Following this latest refusal to respond, Sanchez resigned, concluding that he would ever get a fair hearing, would continue to be subjected to the harassment which led to his merit pay removal, would never be provided any kind of meaningful or fair hearing by the City, and that his mental health was seriously at jeopardy. [Ex 55:161-62; RT 9246-50].

The City offered a summary of all merit pay removals in the SAPD from 1978-85, with "employee #2" stipulated to be Sanchez [Ex 142; RT 9371-73]. The summary shows Sanchez' step "E" removal as occurring by a "special evaluation," the only such reference; the removal of step "D" shows nothing in that column, and is the only one that does not indicate an evaluation or discipline. [Ex 142]. The

City presented no evidence as to the merits of Sanchez' alleged "nonmeritorious performance", in support of its defense that his merit pay would have been removed even if he had been afforded due process.

ARGUMENT

I.
THE CITY WAIVED OR LIMITED ITS RIGHT TO OBJECT TO SOME OF THE ISSUES PRESENTED IN THIS PETITION

A. By Failing to Make a Directed Verdict Motion and to Object to the Jury Instructions and Verdict Forms, the City Waived or Restricted its Available Grounds for Appeal before the Ninth Circuit

The holdings and reasoning of the Ninth Circuit must be viewed in light of its application of the explicit provisions of F.R.Civ.P. 50(b). The City failed to make a motion for directed verdict at the close of the evidence at the damage phase trial, or at any time during that trial, "inartfully" or otherwise, and hence could not move for JNOV nor challenge the

sufficiency of the evidence in the district court or on appeal, see F.R.Civ.P. 50(b); Cabrales v. County of Los Angeles, 864 F.2d 1454, 1459 (9th Cir. 1988); Farley Transp. Co. v. Santa Fe Transp. Co., 786 F.2d 1342, 1345-47 (9th Cir. 1985); nor could it assert any grounds not asserted in a prior motion for directed verdict, see Lowe v. Conlee, 742 F.2d 1140 (8th Cir. 1984). The City was properly limited by the district court and the Ninth Circuit to review of its motion for new trial. See Farley Transp. Co., supra, 786 F.2d at 1347.

The motion for new trial must also be viewed in light of the failure to make a directed verdict motion. When a party fails to make a motion for directed verdict, "the district court's denial of the motion for new trial is reversible only if the record contains no evidence in support of the verdict." Id., 786 F.2d at

1347.

The decision of the Ninth Circuit must also be viewed in light of the City's failure to object to Sanchez' verdict forms, and having failed to propose any verdicts or interrogatories. The Ninth Circuit decision therefore "presumes the existence of factual findings and legal conclusions necessary to support the verdict reached by the jury . . . controlled by the court's instructions to the jury." Bio-Rad Laboratories v. Nicolet Instrument Corp., 739 F.2d 604, 607 (Fed. Cir. 1984). Accord, Velo-Bind, Inc. v. Minn. Mining & Mfg. Co., 647 F.2d 965, 971 (9th Cir. 1981).

The decision of the Ninth Circuit must also be viewed in light of the City's failure to object to the jury instructions given at trial. When a party requests a particular instruction, it "invites any

error contained therein and, absent any objection before the instruction is given, waives appellate review of the correctness of the instruction". See Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1493 (9th Cir. 1986).

The primary instruction given by the district court on constructive discharge -- employing the objective reasonableness test -- was modified from City's Instruction #13, removing the element of liability, per the summary judgment, and the words "sufficiently frequent or bad"; after which the City did not object in its final form as modified by the district court [ER 1069-70; RT 9394-402, 9432-34, 9443-45].

Thus, the Ninth Circuit deemed as waived any objection by the City to any of the above instructions, even if there were previous objections which were not maintained after the district court

informed counsel of the instructions and modifications which it intended. See Benigni v. City of Hemet, 879 F.2d 473 (9th Cir. 1989), cert. denied ___ U.S. ___ (1990).

B. City Waived Right to Assert the Existence of Material Issues of Fact as to Due Process Claim

When the summary judgment motion was before the district court, the City, despite being offered an additional opportunity to present admissible evidence, did not even contend that there were any genuine issues of material fact; and did not offer any declarations or other competent evidence beyond what Sanchez had provided in his motion; and argued that defendants were themselves entitled to judgment as a matter of law because there was a grievance procedure available to him which afforded recourse to the City Manager, and because the City was entitled

as a matter of law to apply amended sec.1008 retroactively.

Since that time, and the failure of that tactical posture, the City has presented a constantly shifting sequence of contentions and arguments. First, the City sought reconsideration based on its belated, selective, self-serving statements about some unwritten city-wide grievance procedure, made at the subsequent trial two years later on other claims, and first made the argument that Sanchez had "waived" his due process rights by not using the grievance procedure. Still, the City did not claim that there were any genuine issues of material fact, still claiming entitlement to judgment.

Some circuits reject such belated proffers outright as "irrelevant". See Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1035-36 (D.C. Cir. 1988); Nissho-Iwai

American Corp.v. Kline, 845 F.2d 1300, 1307 (5th Cir. 1988). The Ninth Circuit applies a somewhat more flexible rule, but still requires some showing that to disregard the normal rule would result in substantial injustice. See Roberts v. Hollandsworth, 582 F.2d 496, 499-500 (9th Cir. 1978). The City offered no explanation to the district court or the Ninth Circuit why it should be excused from enforcement of the normal rule, and both courts[4] therefore declined to find such "substantial injustice."

II.
THE CITY HAS NOT MADE SUFFICIENT ARGUMENTS TO WARRANT A WRIT OF CERTIORARI ON ANY OF THE DUE PROCESS ISSUES RAISED IN THEIR CROSS-PETITION

A. City Charter sec.1008 Gave Sanchez Vested Property Interest in Merit Pay Which Remained After Amendment

In challenging the conclusions below

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[4]. The district court also based its refusal to reconsider on the City's failure to meet the test in Local Rule 7.16.

that Sanchez had a property interest in his merit pay, the City once again is asking to be excused from the normal rules. Never before had the City asked the district court or the Ninth Circuit to determine the property interest issue by exclusive reference to the merit pay resolution [Appendix P], to the exclusion of consideration of sec.1008, with or without the 1978 amendment [Appendices Q & R]. The argument is itself not supported by the authorities cited.

Although the cases refer to property rights being defined by the instrument that creates them, they do not declare that the instrument should not be interpreted against the backdrop of applicable state law. In Hogue v. Clinton, 791 F.2d 1318 (8th Cir. 1986), cited by the City, the court expressly rejected a similar argument. The court rejected an employee

manual provision establishing a "good cause" requirement for termination because of an overriding state law doctrine that employees are terminable "at will" unless there is an employment contract for a fixed term. See id., 791 F.2d at 1323-24.

In evaluating the scope of a property interest, this Court has indicated that one important source is the "rules or understandings that stem from an independent source such as state law [and] that secure certain benefits and support claims of entitlement to those benefits." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Accord, Bishop v. Wood, 426 U.S. 341, 344 (1976) ("sufficiency of claim of entitlement must be decided by reference to state law). Accord, Ostlund v. Bobb, 825 F.2d 1371, 1373 (9th Cir. 1987), cert. denied, ___ U.S. ___ (1988).

This posture by the City is made all

the more absurd by the fact that the City obviously amended sec.1008 in June 1978, to exclude removal of merit pay from the definition of demotions that includes "reductions in pay," precisely to remove it from the protections otherwise afforded to demotions. The protections afforded demotions do not stem from the provisions which prescribe specific procedures that must be followed. Rather, sec.1008 expressly declares that a demotion, like termination or suspensions, must be grounded on a finding of specific misconduct or other good cause[5]. [Appendix Q2-Q3].

The provisions of sec.1008 meet the

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[5]. Sec.1008 enumerates these as follows: "incompetency, inefficiency, dishonesty, misconduct, insubordination, failure to observe department or city rules or the rules and regulations as provided for in this Article, or failure to cooperate reasonably with his superiors or fellow employees." [Appendix Q2-Q3].

required standard for establishment of a property interest in order to trigger constitutional due process requirements. See Olim v. Wakinekona, 461 U.S. 238, 248-51 & n.10 (1983); Hewitt v. Helms, 459 U.S. 460, 471-72 (1983); Board of Curators v. Horowitz, 435 U.S. 78, 92 n.8 (1978). A benefit which is retained by the employee "during good behavior and efficient service" or in the absence of various forms of misconduct establishes a property interest protected by the due process clause. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985). This is precisely the rule correctly applied in the Ninth Circuit. See Clemente v. United States, 766 F.2d 1358, 1364-65 (9th Cir. 1985), cert. denied, 106 S.Ct. 881 (1986) (property interest created by "significant substantive restriction" on decision-making); Goodisman v. Lytle, 724

F.2d 818, 820 (9th Cir. 1984) (same).

The Ninth Circuit was applying basic, black letter law in concluding that sec.1008 provides significant substantive restrictions on the decision-making when a demotion is being considered; and further, that prior to June 1978, those restrictions applied to all reductions in pay, and only after June 1978 was merit pay removed from the ambit of the provision including reductions in pay as demotions.

Prior to this Cross-Petition, defendants never contended that the pre-1978 sec.1008 did not create a property interest in a reduction in pay, including a loss of merit pay. Their sole arguments were that the 1978 amendment could apply retroactively, and even if it did not, then the grievance procedure was sufficient due process. The attempt to graft an entirely new argument, that merit pay was never

embraced by sec.1008, does not even begin to offer a basis for a grant of certiorari.

B. The City's Belated Argument that Legislative Enactments Can Abrogate Vested Property Interests in Employment Is Not a Sufficient Grounds for a Writ of Certiorari

At the time of the summary judgment motion, Sanchez expressly briefed the issue of whether a legislative enactment could abrogate vested contractual property interests. The City responded by simply insisting the contrary position, without citation of any authority whatsoever. On appeal to the Ninth Circuit, the City did not even mention this entire issue. The City cited no error on this issue, and did not cite any authority for the proposition that sec.1008 as amended should or could be applied retroactively.

The Ninth Circuit, in determining the scope of Sanchez' property interest in his merit pay, correctly relied on California

state law, as determined by its highest court, that pay levels in public employment give rise to contractual obligations protected by the prohibition against legislative interference with contracts, citing Olsen v. Cory, 27 Cal.3d 532, 538-39 (1980). Accord, Sonoma County Org. of Public Emp. v. County of Sonoma, 23 Cal.3d 295, 308-309, 314 (1979). The City had not contended otherwise on appeal, and had provided no contrary authority at any time before any court in this matter. This belated raising of the issue, with an even more belated effort to brief the issue, should not be permitted as a basis for issuance of a writ of certiorari.

Moreover, the authorities cited by the City do not even directly address the issue. As above-stated, California law views public employment as giving rise to contractual obligations even if there is no

express contract. Legislative impairment of vested contractual rights in respect to pay may be justified only by a showing of an "emergency justification" to which the enactment is appropriate, with only a temporary removal. See Olson, supra, 27 Cal.3d at 539; Sonoma County Org. of Public Emp., supra, 23 Cal.3d at 305-06[6]. The greater the impairment of the contractual obligation, the higher is the hurdle to be cleared. See Olson, supra, 27 Cal.3d at 539; Sonoma County Org. of Public Emp., supra, 23 Cal.3d at 308-09[7]. A public entity is not free to reduce its contractual obligations merely for a perceived public good. See Sonoma County Org. of Public Emp., supra, 23 Cal.3d at

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[6]. Accord, Home Building and Loan Assn. v. Blaisdell, 290 U.S. 398 (1934).

[7]. Accord, Allied Struc. Steel Co. v. Spannaus, 418 U.S. 234, 245, 250 (1978).

307-08[8].

This situation is therefore quite different from that presented in the several cases cited by the City, in which the courts have permitted prospective reduction in public benefits. In none of the cases cited were there circumstances in which the intended recipients of the benefits involved had a vested contractual claim of entitlement based on the law creating the entitlement. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 432-33 (1982) (no contractual obligation involved; state can enact substantive limitations on causes of action as one aspect of its definition of the property interest, but may not employ a procedural scheme to

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[8]. Accord, United States Trust Co. v. New Jersey, 431 U.S. 1, 26-31 (1977).

destroy a property interest)[9]; Martinez v. California, 444 U.S. 277, 280-82 & n.5 (1980) (no contractual obligation involved; state can enact substantive limitations on causes of action as one aspect of its definition of the property interest); Fleming v. Nestor, 363 U.S. 603, 610-11 (1960) (no contractual obligation involved; no restriction on power to reduce benefits, given provision in original act expressly reserving power to "alter, amend or repeal any provision"); Bi-Metalic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445-46 (1915) (no contractual obligation involved; state has inherent power to increase assessment value of property for tax purposes).

The standard for evaluating

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[9]. None of the other cases cited therein involve a vested contractual obligation being abrogated by legislative action.

legislative abrogation of contractual obligations, especially vested ones, is constitutionally different than when benefits are involved in which the beneficiary has no more than a mere expectancy that the particular benefit level will be maintained. See Allied Structural Steel Co., supra, 418 U.S. at 245, 250 (standard for contractual obligations); United States Trust Co., supra, 431 U.S. at 26-31 (same); Home Building and Loan Assn., supra (same).

The district court and the Ninth Circuit concluded that, under state law, there was no basis to afford retroactive application to the amendment to sec.1008. They did so without any meaningful opposition or briefing from the City -- none at all before the Ninth Circuit. There is no record which would support the City's claim that the courts should have

decided otherwise. A petition before this court is not the time to first begin fashioning a record on which to contest and decide these issues.

Thus, when Sanchez' entitlement to merit pay steps D and E vested prior to June 1978, under applicable state law they could thereafter be revoked only upon specific acts of misconduct. Retroactive removal of such property interests has been deemed, under California law, to be "drastic" for the purpose of analyzing alleged impairment of contracts. See Olson, supra, 27 Cal.3d at 538-40 (elimination of cost-of-living increase is drastic); Sonoma County Org. of Public Emp., 23 Cal.3d at 308-09 (elimination of pay increase for one financial year is severe, permanent and immediate). The court in Olson expressly rejected the claim advanced herein, without competent evidence

on the record, that the impairment could be justified over the difficulty of temporarily having a dual system. Id., 27 Cal.3d at 539-40.

In the absence of the appropriate justification, the applicable provisions were those in the pre-June 1978 version. In fact, the amendment does not purport to be retroactive, and by giving it only prospective application, there is no impairment of contracts and no deficiency in the City's showing.

C. Given that the Substantive Process Made Available to Sanchez Deprived Him of His Property Interest in the Merit Pay, There Is No Basis for a Writ of Certiorari

The City's continuing pre-occupation with the issue of whether its grievance procedure permitted review by the city manager reflects a fundamental misunderstanding of the issue involved. In the City's opening brief before the Ninth

Circuit, the City described the nature of the procedure made available via the grievance procedure.

> "[T]he City's grievance procedure satisfies all requirements for federal procedural due process.
>
> "The procedure for removal of merit pay steps in Santa Ana is set forth in Section 1008 of the City of Santa Ana Charter [as amended in 1978]."

City's Opening Brief, p. 13. The City's brief then quoted from Section 1008 as amended, underscoring the language providing that merit pay, unlike other reductions in pay which require a showing of specific misconduct or other like act, can be removed as a "result of a finding by the appointing authority that the employee's performance does not justify continuance of a level of pay that is dependent on meritorious service . . . ."

It is this language, this application of section 1008 retroactively, which

rendered this so-called city-wide grievance procedure constitutionally inadequate. The procedure is not defective merely because of who the appeal is directed to or who would hear it, but rather because it removes the substantive restrictions on decision-making contained in section 1008 prior to its amendment.

The amended section 1008 [Appendix Q], the merit pay resolution [Appendix P], the SAPD Grievance Procedure [Ex 66:26], and the several memorandums sent to Sanchez instructing him on the grievance procedure all had one thing in common: they would have permitted removal of his merit pay on a bare showing that he no longer was serving meritoriously. The former section 1008 was the only provision which fit the facts herein, and which also assured that the decision would be subjected to the substantive limitations imposed on the

decision-making process for demotions and pay reductions. [Appendix R]. See Olim, supra, 461 U.St at 249-50; Goodsman, supra, 724 F.2d at 820-21.

As mentioned above, this whole issue over the city manager and the so-called unwritten city-wide grievance procedure, first asserted by defendants long after summary judgment had already been issued, has not been properly preserved. The City should not be permitted to so utterly disregard all procedural obligations, as they have done at almost every turn in this matter. In any case, the argument is plainly a diversion from the determinative issue: whether Sanchez' timely and repeated invocation of the procedure which protected his substantive property interest waived his due process rights because the City insisted that it would only recognize invocation of another unwritten procedure

which clearly did not recognize Sanchez' property interest in his merit pay.

The Ninth Circuit herein clearly concluded both that Sanchez was entitled to invoke the only procedure which included the substantive protections to which he was entitled; and further, that a constitutional right cannot be deemed waived under such circumstances of extraordinary ambiguity. In so doing, the Ninth Circuit cited Ostlund, supra. The City remarkably ignores this case and the panel's waiver analysis, even though the Ostlund case also involved the City of Santa Ana. Instead, the City continues to cite Veit v. Heckler, 746 F.2d 508 (9th Cir. 1984), which held such a waiver occurred, but only after first concluding that the employee had no property interest in the grant of a merit pay increase in the first instance. Id., 746 F.2d at 511.

In the final analysis, no administrative appeal of any kind was ever afforded. Sanchez was only offered a procedure bereft of the substantive protections to which he was entitled. Even then, when Sanchez responded in writing, as he was entitled to do, Chief Davis never responded as he was obliged to do. See Ostlund, 825 F.2d at 1373.

III.
THE CITY'S BELATED ASSERTION OF AN ISSUE OF ENTITY LIABILITY THAT IS CONTRARY TO ITS PREVIOUS POSITIONS IS NOT A SUFFICIENT BASIS FOR A WRIT OF CERTIORARI

The City is attempting to turn an issue which only became important enough to be mentioned by the City, for the first time, in its Reply Brief on appeal. The Ninth Circuit declined to address the entity liability issue first raised by the City in its Reply Brief. The City gave the Ninth Circuit panel no grounds or reason to exercise its "discretion," as now urged by

the City, to disregard the rule that is necessary both for fundamental fairness to the opposing party and the orderly process of the court.

Now, the City has asked this Court to conclude that the Ninth Circuit, in declining to consider the belatedly asserted issue, was creating a rule which places it at odds with all other circuits. In other words, the City is taking the view that there is a rule in all other circuits which would have permitted the City to assert this issue at such a late date -- with no authority offered to support that conclusion. This is simply nonsense.

The rule which the City would have adopted may be summed as follows: (1) Sanchez had the burden to demonstrate his entitlement that he was entitled to summary judgment as a matter of law; (2) the City has from time-to-time stated that Sanchez

was not entitled to judgment as a matter of law; therefore, (3) any and all legal issues are implicitly preserved, whether or not ever actually raised, and may be asserted at any time, even after the opposing party has no further opportunity to brief the matter; and (4) in such circumstances, it is an abuse of discretion for the court of appeal to decline to consider the newly raised argument. Not surprisingly, there is not a shred of authority for such a preposterous rule, and no reason for this Court to consider adoption of such a rule.

Moreover, it is a phony issue. Entity liability can be established by showing that the decision-maker's decisions were constrained or guided by official policy whose application by the decision-maker caused the constitutional deprivation. See City of St. Louis v. Praprotnik, 485 U.S.

112, 127 (1988). While the issue of whether a particular official is a policy-making official is a question of law to be determined by the court, see id., 485 U.S. at 142, the questions of whether a particular constitutional deprivation was caused by policy-makers, or whether there is a custom or practice that amounts to policy, are questions of fact to be determined by the jury, see Jett v. Dallas Independent School Dist., 491 U.S. 701, 190 S.Ct. 2702, 2723 (1989). Fact based entity liability can also be shown by proof that the entity ratified or acquiesced in the unlawful conduct and the basis for it. See Praprotnik, supra, 485 U.S. at 127.

There has never been any dispute but that the issue before the district court, and initially before the Ninth Circuit as well, has always been whether the City policy of applying sec.1008 as amended

retroactively violates the due process clause of the constitution by virtue of its removal of substantive protections for vested property interests in merit pay. First, the summary judgment was actually initiated by the City, which had asked the district court to declare that its policy of applying sec.1008 as amended retroactively is constitutional. Second, as quoted above from the City's Opening Brief, it has been the expressly stated position of the City until the Reply Brief that its established city-wide grievance procedure, when applied to loss of merit pay, invoked the provisions of sec.1008 as amended.

At the time of the motion for summary judgment, the City presented no evidence whatsoever, and repeatedly declined to contend that there were any genuine issues of material fact. The posture of the

cross-motions before the district court fully warranted it to conclude that both sides agreed that the issues presented were matters of official policy, with the parties disputing only the legality of the policies. Thus, none of the fact based issues involved were litigated or decided. And even in the numerous motions to reconsider offered by the City, it never suggested that the district court made this error now cited as a basis for Supreme Court review.

There simply is no issue of importance here, nor any conflict between the Ninth Circuit and other circuits or this Court's authorities. Rather, there was a defendant who first litigated exhaustively that its official policy was lawful; then, at the last moment, attempted to reverse field and argue that there was no policy at all. In refusing to permit this, there was no

departure by the Ninth Circuit from any rule or authority.

IV.
THE CITY HAVING FAILED TO PROPERLY MAKE A DIRECTED VERDICT MOTION, IT HAS NO LEGAL BASIS ON WHICH TO SEEK A WRIT OF CERTIORARI ON THE ISSUE OF CONSTRUCTIVE DISCHARGE

Although the City has argued since the end of the trial that constructive discharge was precluded as a matter of law because there was only a "single incident", it never made a motion for directed verdict on that issue. Hence, the Ninth Circuit properly applied its rules for motions notwithstanding the verdict [JNOV] and for new trial when a proper motion under F.R.Civ.P. 50(b) has not been made. See Discussion, supra, at Section I.A. Under those rules, a JNOV is absolutely prohibited and a new trial can be ordered only if there is absolutely no evidence at all on which a jury could conclude that a reasonable person would feel compelled to

resign. See Ford v. Alfaro, 785 F.2d 835, 841-42 (9th Cir. 1986); Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987).

Although there is a "general" rule that more than a single incident is required, the test in the Ninth Circuit is a rule of reasonableness, and there is a general rule that such determinations of reasonableness are reserved to the jury. See id., 823 F.2d at 361. The jury instruction in this case, applying the reasonableness test, was presented by the City, which now is therefore precluded from objecting on appeal. See Benigni, supra.

Normally, to overcome the "single incident" rule, the employee need only show "some aggravating factors", with a continuous pattern of discrimination being only one form. Id. In at least one case, the Ninth Circuit upheld four incidents

over a two year period as sufficient to warrant sending the matter to the jury. Id. In Satterwhaite v. Smith, 744 F.2d 1380, 1381-82 (9th Cir. 1984), constructive discharge was found from denial of promotion opportunity coupled with demeaning tasks and occasional racial insults.

In this case, the uncontroverted record reflects a substandard evaluation was received, recommending removal of step "E"; removal of step "E" without compliance with par.58-281 -- i.e. no notice or review by City Manager; retroactive removal of step "E" on date Sanchez left work with a stress reaction; removal of step "D" two weeks after removal of step "E" and while Sanchez was still out on stress leave, for two disciplinary actions about which Sanchez was grieving, again without complying with par.58-281; phrasing removal

of step "D" as "administrative" to avoid notice and hearing procedures; receiving notice of removal of merit steps by receipt of pay check with sum simply removed from pay; relegating Sanchez to SAPD grievance procedure, with written or oral submission to Chief Davis as sole recourse, then ignoring Sanchez' written grievances; refusal to reconsider reinstatement of merit pay after six months, including again refusing to comply with review procedures in par.58-281, requiring notice and review by City Manager. Further, all of this occurred during a stipulated 30% permanent emotional disability, making police work emotionally impossible for Sanchez. Certainly, this constitutes "some evidence" in support of the verdict.

Under Rule 50(b), there is simply no basis on which the Ninth Circuit can be faulted for failing to give the City the

JNOV that it requested. And, given the instruction proposed by the City and given by the district court, and given that there was indisputably "some" evidence from which the jury could have reached its verdict that Sanchez was constructively discharged, there was no legal basis on which the Ninth Circuit could have concluded that a new trial should have been granted by the district court.

CONCLUSION

Sanchez respectfully requests this Court to deny the Cross-Petition for a Writ of Certiorari.

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Respectfully submitted,

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